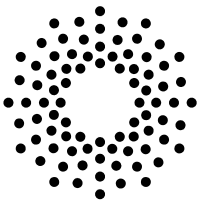

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The Barrie Guide to the Law of Contract 2020-2021

Volume Two

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1 CERTAINTY OF TERMS

1.1 The obligations undertaken by the parties to a contract are known as “terms”. A court will endeavour to enforce the express wishes of the parties, but will declare a contract to be void if the terms are too vague.

1.2 ***Scammell and Nephew Ltd v. HC and JG Ouston*** **[1941] AC 251 (HL)**

“When we find as we do in this curious case that the trial judge and the three Lords Justices, and even the two counsel who addressed your Lordships for the respondents, were unable to agree upon the true construction of the alleged agreement, it seems to me that it is impossible to conclude that a binding agreement has been established by the respondents.” per Viscount Maugham at p 257

“The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted. But the test of intention is to be found in the words used. If these words, considered however broadly and untechnically and with due regard to all the just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract. Such a position is not often found. But I think that it is found in this case.

My reason for so thinking is not only based on the actual vagueness and unintelligibility of the words used, but is confirmed by the startling diversity of explanations, tendered by those who think there was a bargain, of what the bargain was. I do not think it would be right to hold the appellants to any particular version. It was all left too vague. There are many cases in the books of what are called illusory contracts, that is, where the parties may have thought they were making a contract but failed to arrive at a definite bargain. It is a necessary requirement that an agreement in order to be binding must be sufficiently definite to enable the court to give it a practical meaning. Its terms must be so definite, or capable of being made definite without further agreement of the parties, that the promises and performances to be rendered by each party are reasonably certain.” per Lord Wright at p.268

1.3 ***Bushwall Properties v. Vortex Properties Ltd*** **[1976] 1 WLR 591**

The parties agreed to a sale of land in three instalments. On the payment of each instalment “a proportionate part of the land” was to be released to the buyer. There was, however, no mechanism within the contract for allocating “the proportionate part of the land” so the entire agreement was held to fail.

1.4 To declare a contract void in such circumstances is, however, regarded as a last resort, especially when it is clear that both the parties intended their agreement to be enforceable.

1.5 ***WN Hillas and Co. Ltd. v. Arcos Ltd.*** **(1932) 147 LT 503 (HL)**

“It is clear that the parties both intended to make a contract and thought they had done so. Business men often record the most important agreements in crude and summary fashion: modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects, but, on the contrary, the Court should seek to apply the old maxim of English law, ' verba ita sunt intelligenda ut res magis valeat quam pereat .' [words are to be understood such that the subject matter may be more effective than wasted].

“That maxim, however, does not mean that the Court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as for instance, the implication of what is just and reasonable to be ascertained by the Court as matter of machinery where the contractual intention is clear but the contract is silent on some detail. Thus, in contracts for future performance over a period, the parties may neither be able nor desire to specify many matters of detail, but leave them to be adjusted in the working out of the contract.

"Save for the legal implication I have mentioned, such contracts might well be incomplete or uncertain: with that implication in reserve they are neither incomplete nor uncertain. As obvious illustrations I may refer to such matters as prices or times of delivery in contracts for the sale of goods, or times for loading or discharging in a contract of sea carriage. Furthermore, even if the construction of the words used may be difficult, that is not a reason for holding them too ambiguous or uncertain to be enforced, if the fair meaning of the parties can be extracted." per Lord Wright at p.514

1.6 ***Astor Management AG v. Antalava Mining plc*** **[2017] EWHC 425 Comm**

"The role of the court in a commercial dispute is to give legal effect to what the parties have agreed, not to throw its hands in the air and refuse to do so because the parties have not made its task easy. To hold that a clause is too uncertain to be enforceable is a last resort or, as Lord Denning MR once put it, 'a counsel of despair'." per Leggatt J

1.7 ***Openwork Ltd. v. Alessandro Forte*** **[2018] EWCA Civ 783**

"Although the authorities indicate that cases in which contractual provisions are challenged as being void for uncertainty are to be decided on their own facts, and that Courts should not transpose a decision on a term in one case to a contractual provision in another, there is clear guidance as to how Courts should approach an argument that a contractual provision is too uncertain to be enforced.

"The Court should strive to give some meaning to contractual clauses agreed by the parties if it is at all possible to do so." Lord Justice Simon at paras 24 and 25

2 ARBITRATION CLAUSES

2.1 To avoid a contract failing for uncertainty, the parties should include within its terms the machinery to settle any such disputes. This will usually be an "arbitration clause".

2.2 ***Foley v. Classique Coaches Ltd*** **[1934] 2 KB 1**

Foley sold part of his land to a coach company for use as a coach station, on condition that the company would buy all their petrol from him "at a price to be agreed between the parties". It was also agreed that any dispute arising from the contract should be submitted to arbitration. The parties failed to agree a price, and the company refused to buy petrol from Foley. The agreement was held to be binding since there was a way of ascertaining the price under the terms of the contract.

3 MEANINGLESS CLAUSES AND THE BLUE PENCIL

3.1 Totally meaningless clauses which can be struck out without affecting the contract will not render it void. This is sometimes called "blue pencilling".

3.2 ***Nicolene Ltd v. Simmonds*** **[1953] 1 QB 543 (CA)**

Steel bars were bought on the basis that the sale was subject to "the usual conditions of acceptance." There were no such conditions, but the contract made sense without this meaningless term, so it was simply struck out.

3.3 However, the court may find a meaning in the context of a contract even though, on face value, a term might be meaningless. Thus, in *Carlill v. Carbolic Smoke Ball Co*, the court held that although it was unclear whether the prize would have been valid if someone caught influenza years after using the smokeball, as Mrs Carlill had caught it whilst using the ball, it made sense in the context of her complaint, and that was what mattered.

3.4 In fact, this is a strange method of construction, as the terms of a contract ought to be clear at the time the contract was made, not just in the context of the particular breach. However, this somewhat subjective way of interpreting terms can be seen in other cases too, and may be more to do with policy than principle.

3.5 ***Lambert v. HTV Cymru (Wales) Ltd*** **[1998] The Times, 17 March (CA)**

Lambert owned the copyright in certain cartoon characters. He assigned the rights in these to HTV, who agreed to use "all reasonable endeavours" to obtain for Lambert rights of first negotiation for book publishing from any assignee. HTV assigned the rights to various US film and publishing companies without obtaining for Lambert these rights of first negotiation.

Lambert sued, and at first instance it was held, *inter alia*, that the duty to use "all reasonable endeavours" was too vague to support a cause of action. However, on appeal, it was held that the words were not so uncertain as to be unenforceable. Although it might not be clear what constituted "reasonable" endeavours, as HTV had made no endeavours at all, this was clearly not "all reasonable endeavours".[1]

4 APPLYING THE CLEAR WORDS OF A CONTRACT

4.1 If the language used by the parties has a clear meaning the courts will generally apply that meaning, even if it leads to surprising results.

4.2 ***Rainy Sky SA v. Kookmin Bank*** **[2011] 2 CLC 923 (SC)**

"Where the parties have used unambiguous language, the court must apply it. This can be seen from the decision of the Court of Appeal in Co-operative Wholesale Society Ltd v. National Westminster Bank plc [1995] 1 EGLR 97 . The court was considering the true construction of rent review clauses in a number of different cases. The underlying result which the landlords sought in each case was the same. The court regarded it as a most improbable commercial result. Where the result, though improbable, flowed from the unambiguous language of the clause, the landlords succeeded, whereas where it did not, they failed. The court held that ordinary principles of construction applied to rent review clauses and applied the principles in Antaios Cia Naviera SA v. Salen Rederierna AB (The Antaios) [1985] AC 191.

"After quoting the passage from the speech of Lord Diplock cited above, Hoffmann LJ said, at p 99: This robust declaration does not, however, mean that one can rewrite the language which the parties have used in order to make the contract conform to business common sense. But language is a very flexible instrument and, if it is capable of more than one construction, one chooses that which seems most likely to give effect to the commercial purpose of the agreement." per Lord Phillips at para 23

4.3 ***Arnold v. Britton*** **[2015] AC 1619 (SC)**

The case concerned a term in a long-lease of a holiday chalet, which set the service charge at £90 in the first year, rising by 10% per annum thereafter. The lessees argued that this could not be what was meant as it would lead to a ridiculous annual charge of over £550,000 by the end of the lease. They claimed that the correct interpretation of the clause was that the lessees had to pay a fair proportion of the cost of providing the services, up to a maximum of £90 in the first year, that maximum figure rising by 10 per cent each year thereafter.

The Supreme Court held that as the literal meaning of the words used was clear, it was not up to the court to rewrite the contract to make it more commercial or fair.

"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v. Persimmon Homes Ltd [2009] AC 1101 , para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context.

1 'Reasonable endeavour' clauses have featured in several cases. In *Dany Lions Ltd. v. Bristol Cars Ltd*. [2014] 2 All ER (Com) 403, it was held that a contractual clause imposing a condition precedent on a contracting party to use its reasonable endeavours to secure a contract with a third party was insufficiently certain to give rise to enforceable obligations. However, in *Astor Management AG v. Atalaya Mining plc* [2018] 1 All ER (Comm) 547, a clause which required the defendants to use all reasonable endeavours to obtain a debt facility by a certain date was held to be objectively measurable (and so valid) as the use of the word 'reasonable' gave discretion to the court to resolve any disputes.

"That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions…

"For present purposes, I think it is important to emphasise seven factors.

"First, the reliance placed in some cases on commercial common sense and surrounding circumstances… should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. "Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision.

"Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

"The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made…

"Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

"The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.

"Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention.

"An example of such a case is Aberdeen City Council v Stewart Milne Group Ltd 2012 SC (UKSC) 240 , where the court concluded that "any … approach" other than that which was adopted "would defeat the parties' clear objectives", but the conclusion was based on what the parties "had in mind when they entered into" the contract: see paras 21 and 22.

"Seventhly, reference was made in argument to service charge clauses being construed "restrictively". I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation." per Lord Neuberger, paras 15-23

4.4 ***Wood v. Sureterm Direct Ltd.*** **[2017] AC 1173 (SC)**

The parties had entered into a written agreement for the sale of the company. Under an indemnity clause, the seller agreed to indemnify the buyer in respect of "...all actions, proceedings, losses, claims, damages, costs, charges, expenses and liabilities suffered or incurred, and all fines, compensation or remedial action or payments imposed on or required to be made by the company following and arising out of claims or complaints registered with the [Financial Services Authority or other regulator]... pertaining to any mis-selling or suspected mis-selling..." in the period before the sale.

Shortly after the purchase, company employees alleged that the company had mis-sold products to customers. The buyer informed the Financial Services Authority, which directed it to pay compensation to affected customers. The buyer sought to rely on the indemnity clause to recover its losses from the seller.

The Court of Appeal held that the indemnity was confined to loss arising from a claim or complaint. It determined that the indemnity did not apply to the buyer's losses because they arose from the company's referral of itself to the FSA, and not as a result of any customer making a claim or registering a complaint with the FSA or any other regulator. The buyer submitted that the Court of Appeal had placed too much emphasis on the precise words of the agreement and given insufficient weight to the factual matrix, having been wrongly influenced by the decision in *Arnold v. Britton*. The Supreme Court dismissed the appeal.

"The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning…

"Where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause… and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest." per Lord Hodge, paras 10-11

4.5 ***Trillium Prime Property GP Ltd. v. Elmfield Road Ltd*****. [2018] EWCA Civ 1556**

A rent review clause in a business lease was highly prejudicial to the tenant. The tenant claimed that the term was either too ambiguous to be enforced; or that it should not be interpreted literally, as the term was contrary to sound commercial practice and so could not have been intended by the parties to have that effect.

It was held that the term was not ambiguous, and that the court would not rewrite it to suit the tenant's interests.

"The fact that a contract term was an imprudent one for a party to have agreed or that it has worked out badly or even disastrously is no warrant for departing from the clear language of the contract, especially when that contract has been professionally drafted." per Lewison LJ at para 18

4.6 Note that *interpreting* the express words used in a contract is not the same exercise as *implying* terms into it; the latter should only be done if the clear words of the contract seem to leave a gap.

4.7 ***Marks and Spencer plc v. BNP Paribas Securities Services Trust Co.*** **[2016] AC 742 (SC)** (see 20.5 below)

"I accept that both (i) construing the words which the parties have used in their contract and (ii) implying terms into the contract, involve determining the scope and meaning of the contract. However, Lord Hoffmann's analysis in the Belize Telecom case could obscure the fact that construing the words used and implying additional words are different processes governed by different rules.

"Of course, it is fair to say that the factors to be taken into account on an issue of construction, namely the words used in the contract, the surrounding circumstances known to both parties at the time of the contract, commercial common sense, and the reasonable reader or reasonable parties, are also taken into account on an issue of implication. However, that does not mean that the exercise of implication should be properly classified as part of the exercise of interpretation, let alone that it should be carried out at the same time as interpretation. When one is implying a term or a phrase, one is not construing words, as the words to be implied are ex hypothesi not there to be construed; and to speak of construing the contract as a whole, including the implied terms, is not helpful, not least because it begs the question as to what construction actually means in this context.

"In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Until one has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term."

per Lord Neuberger PSC at paras 28-28

5 RESOLVING AMBIGUITIES

5.1 Where a term is ambiguous, the court will usually apply the meaning which objectively seems to make more commercial sense.

5.2 ***Attorney General of Belize v. Belize Telecom Ltd*** **[2009] 1 WLR 1988 (Privy Council)**

"There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?" per Lord Hoffmann at para 21

5.3 ***Rainy Sky SA v. Kookmin Bank*** **[2011] 2 CLC 923 (SC)**

"The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

per Lord Phillips at para 2

5.4 ***Martinez v. Ellesse International SPA*** **[1999] CLY 861 (CA)**

By a contract with Ellesse International, a sportswear manufacturer, Conchita Martinez was entitled to a £550,000 bonus if she was ranked the world's number two tennis player in any contract year. There are two possible ways of calculating ranking: one is to take the player's rank for the best week in each month, and then to average that out over the year; the other is to compare the player's ranking with those of other players. In 1996, Martinez's average ranking based on the first method was 2.5 and she claimed her bonus.

It was refused on the basis that by the second method her ranking was only 4, as there were three players above her (S Graff, M Seles and A Vicario).

The Court of Appeal agreed that the second method made most sense, so she was only number 4. However, even if they had gone with the first method, she would still have only been number 2.5 (as opposed to 2.0), so by her own calculations she was probably not entitled to the bonus anyway!

5.5 ***Pink Floyd Music Ltd v. EMI Records Ltd*** **[2011] 1 WLR 770 (CA)**

Pink Floyd, founded in 1966, were one of the most successful rock bands of all time, noted for their progressive and psychedelic music.

They contracted with EMI to distribute their back catalogue, but anxious to maintain the integrity of their masterpieces (which include "The Wall" and "Dark Side of the Moon") they included the following clause in the contract:

"The [defendant] warrants undertakes and agrees with [the first claimant]…not to couple Records delivered hereunder with other master recordings or to sell in any form other than as the current Albums and to exploit the Albums in exactly the same form as to track listing and timing as are delivered hereunder (without limitation there are no rights to sell any or all of the Records as Single records other than with the company's prior written consent which may be absolutely withheld)."

Without any such consent, EMI marketed single track downloads, single track streaming and part track ring-tones. They claimed that as these were not "records" in the sense of being physical recordings, they did not need permission to market them.

Held: The obvious purpose of the clause was to preserve the artistic integrity of the albums, and so must extend to digital as well as physical recordings. EMI were in breach.

5.6 ***Warley v. Opera Solutions LLC*** **[2011] EWHC 2130 (QB)**

A contract for the employment of a management consultant contained the term: "At the end of the calendar year you will receive a bonus in an amount which will bring your total compensation for the year on an annualised basis to £300,000."

A dispute arose, *inter alia*, as to the meaning of the word "bonus" in this clause, as a predetermined figure cannot be a "bonus" in the normal sense. It was held that the parties must have meant the figure to be part of the base pay and so it was not technically a bonus at all.

5.7 ***PlayUp Interactive Entertainment (UK) Pty Ltd v. Givemefootball Ltd*** **[2001] EWHC 1980 (Comm)**

Givemefootball hosted the official website of the Professional Footballers' Association, and invited sponsorship for the annual PFA Fans' Awards, in which members of the website were invited to vote for their player of the month and year. PlayUp agreed to sponsor the awards on the basis that G would send 12 emails to at least one million "targeted" members who had "opted-in" (i.e. agreed to receive marketing from the sponsor) with marketing from PlayUp.

In fact, G sent emails to only 260,000 people, and many of them were not the opted-in people whom P wanted to target, but came from a bought-in list of people with sporting interests. G argued that the requirement that the recipients should be "targeted" could reasonably mean targeted for their general sporting interest, rather than for having opted-in to receive messages from the sponsor.

It was held that in the commercial circumstances of the contact, targeted must be taken specifically to mean the opted-in recipients who had agreed to receive direct marketing.

6 THE EXCLUSIONARY RULE

6.1 In deciding what the terms of a contract were meant to mean, the court will not usually consider what was said in the negotiations leading up to the contract (the so-called "exclusionary rule" in *Prenn v. Simmonds* [1971] 1 WLR 1381) but will consider the commercial/factual context in which the contract was made. This can be quite a fine distinction.

6.2 ***Chartbrook Ltd v. Persimmon Homes Ltd*** **[2009] 1 AC 1101 (HL)**

C owned some development land in Wandsworth, and made a contract with P, a property developer, by which P would obtain planning permission, construct a development on the site and them sell the properties. The price to be paid by P included an "Additional Residential Payment" defined as "24% of the price achieved for each residential unit in excess of the minimum guaranteed residential unit value less the costs and incentives".

The parties disputed the interpretation of the clause, which by P's calculation would net them over £5 million, and by C's, less than £1 million. The court held that it did not make commercial sense to apply it literally, and that what the parties must be taken to have meant – in the commercial context of the deal – was that which was favourable to the landowners, even if it meant altering the precise language used by the parties:

"I do not think that it is necessary to undertake the exercise of comparing this language with that of the definition in order to see how much use of red ink is involved. When the language used in an instrument gives rise to difficulties of construction, the process of interpretation does not require one to formulate some alternative form of words which approximates as closely as possible to that of the parties. It is to decide what a reasonable person would have understood the parties to have meant by using the language which they did. The fact that the court might have to express that meaning in language quite different from that used by the parties…is no reason for not giving effect to what they appear to have meant." per Lord Hoffmann at para 21

6.3 Lord Hoffmann made some interesting *obiter* observations about the strict application of the exclusionary rule:

"I do, however, accept that it would not be inconsistent with the English objective theory of contractual interpretation to admit evidence of previous communications between the parties as part of the background which may throw light upon what they meant by the language they used.
"The general rule…is that there are no conceptual limits to what can properly be regarded as background. Prima facie, therefore, the negotiations are potentially relevant background. They may be inadmissible simply because they are irrelevant to the question which the court has to decide, namely, what the parties would reasonably be taken to have meant by the language which they finally adopted to express their agreement. For the reasons given by Lord Wilberforce, that will usually be the case. But not always. In exceptional cases, as Lord Nicholls has forcibly argued, a rule that prior negotiations are always inadmissible will prevent the court from giving effect to what a reasonable man in the position of the parties would have taken them to have meant.

"Of course, judges may disagree over whether in a particular case such evidence is helpful or not. In Yoshimoto v Canterbury Golf International Ltd [2001] 1 NZLR 523, Thomas J thought he had found gold in the negotiations but the Privy Council said it was only dirt. As I have said, there is nothing unusual or surprising about such differences of opinion. In principle, however, I would accept that previous negotiations may be relevant." per Lord Hoffmann at para 31

7 INCOMPLETE DETAILS

7.1 A contract will not necessarily fail for uncertainty just because there are some matters of detail unresolved.

7.2 ***DMA Financial Solutions Ltd v. BaaN UK Ltd*** **[2000]** (Unreported: Chancery Division)

BaaN owned the rights in a computer programme called Coda, which was designed for use in financial accounting systems. BaaN decided to outsource the provision of training, and in 1998 entered into negotiations with DMA for DMA to become the authorised provider of training. At the end of 1998 there were no outstanding issues between the parties and the matter was referred to BaaN's legal department for a formal agreement to be drafted. The legal department raised objections to some of the terms and attempted to substitute the BaaN standard form agreement.

DMA claimed that the contract was made in 1998 and that, therefore, the terms were no longer negotiable. BaaN claimed that the 1998 agreement was not a contract either because negotiations remained subject to the execution of a written contract or because there were still some matters of detail which required negotiation.

Held: The contract was concluded in 1998. There was no understanding that the contract was subject to a written agreement and a complete agreement was reached orally in 1998. The agreement did not omit any crucial element without which there would be no contract at all on grounds of uncertainty. Since the essential terms were agreed it did not assist BaaN to argue that there was no agreement on matters which had not been raised in the original negotiations. The parties were bound notwithstanding that there was never a formal written agreement.

8 ENTIRE AGREEMENT CLAUSES

8.1 To ensure that neither party can produce additional documents or evidence of prior oral agreements to a written contract which may alter its meaning or scope, it is common to include an "an entire agreement" clause which states that the contract as signed is the totality of the agreement.

8.2 The wording will typically be on these lines:

Entirety of Agreement

This contract comprises the entire agreement between the parties…and there are not any agreements, understandings, promises or conditions, oral or written, express or implied, concerning the subject matter which are not merged into this contract and superseded thereby.[2]

8.3 ***UTB LLC v. Sheffield United Ltd*. [2019] EWHC 2322 (Ch)**

This Agreement, the documents in the Agreed Form and all agreements entered, or to be entered into, pursuant to the terms of this Agreement or entered into between the parties in writing and expressly referring to this Agreement:

26.1.1 together constitute the entire agreement and understanding between the parties with respect to the subject matter of this Agreement; and

26.1.2 (in relation to such subject matter) supersede all prior discussions, understandings and agreements between the parties and their agents (or any of them) and all prior representations and expressions of opinion by any party (or its agent) to any other party (or its agent)

8.4 The courts will respect such clauses, though they will not protect the parties from a claim for misrepresentation.

8.5 ***Inntrepreneur Pub Co v. East Crown Ltd* [2000] 2 Lloyd's Rep 611**

This was a test case brought to discover whether the tenant of a pub (the "Prince Edward" in Holloway) could legitimately break the beer-tie clause in its 30-year lease by relying on a collateral warranty from the landlord that the tie would be released, even though there was an "entire agreement" clause in the lease, and no mention there of any possible break in the tie.

It was held that because of the "entire agreement" clause, the collateral warranty was inadmissible

"The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty.

"The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need which may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of the negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save insofar as they are reflected and given effect in that document." per Lightman J at para 7

[2] *Deepak v. ICI* [1998] 2 Lloyd's Rep 140, 138, affirmed [1999] 1 Lloyd's Rep 387.

9 ORAL AGREEMENTS AND LATER WRITTEN CONTRACTS

9.1 Oral agreements are not impliedly subject to a later written contract

Williams v. Jones **[2014]** (Unreported: QB)

Rowena Williams was the executrix of William Batters (deceased) with whom Gregory Jones had made an oral agreement to purchase Batter's 15% shareholding in a company called Premier Leasing and Finance for £186.000. Batter died before the purchase was complete, and Jones contended that he was not liable to complete as the proposed share purchase had been conditional upon the identification of a purchaser and the most tax efficient means of acquisition; clearance from the Revenue; and entry into a formal written agreement. A formal written agreement had been drawn up, and it was common ground that Batter and Jones had intended to execute it. However, Batters had died before that could be done.

Williams claimed that the written agreement had been intended simply as a record of Batters' and Jones' complete and binding agreement, while Jones asserted that it had to be executed before the agreement could become binding. Although there was no express stipulation that everything was subject to contract, Jones claimed that such a condition was implied.

Held: The oral contract would be upheld. Despite Jones' argument that the agreement was subject to contract, the mere fact that one party pressed for the completion of formal documentation was not an indication that he regarded the agreement as not being legally binding until such documentation had been completed. Documentation could be intended merely to be a record of what had already been agreed. Had the transaction been conducted at arms' length, it might have been imprudent for Batters and Jones to enter into an informal binding agreement. However, they were friends who no doubt trusted each other; there was no need for a "due diligence" or any vendor's warranties. Indeed, Jones never suggested to Batters that their agreement was not binding, and he made no such suggestion to Williams until March 2010. The circumstances clearly pointed to the conclusion that the agreement was not subject to contract or any written version, but was of immediate and binding effect when concluded and completed orally.

II TERMS AND REPRESENTATIONS

10 THE IMPORTANCE OF THE DISTINCTION BETWEEN TERMS AND REPRESENTATIONS

10.1 The terms specifically agreed by the parties are known as “express terms”.These must be distinguished from “mere representations” which are statements made during negotiations which are not intended to have contractual effect. Breach of a term gives rise to an action in contract. A false mere representation may only give rise to an action for misrepresentation.

10.2 There are various tests which the courts apply to see whether a statement is a genuine term or merely a representation.

11 DISTINGUISHING TERMS FROM REPRESENTATIONS

Express Terms and Representations – Verification

11.1 If the maker of a statement suggests that the other party gets it checked, it is unlikely that he meant it to be a term. On the other hand, if he tries to prevent him from checking it, it is likely to be regarded as a term.

11.2 ***Ecay v. Godfrey*** **(1947) 80 L1 LR 286**

When the seller of a boat told a prospective buyer that the boat was sound, but advised him to get it surveyed, it was held that the statement as to its soundness was a mere representation.

11.3 ***Schawel v. Reade*** **[1913] 2 IR 64**

The buyer of a horse was about to inspect it, when the seller said: “You need not look for anything; the horse is perfectly sound. If there was anything the matter with the horse I should tell you.” It was held that this statement was a term.

11.4 ***Hopkins .v Tanqueray*** **(1854)15 CB 130**

A seller made a very similar statement to that in *Schawel v Reade* which was held not to be a term when the buyer bought the horse at an auction at Tattersalls. This was because auctions at Tattersalls are known to be without warranty.

Express Terms and Representations – Importance to Buyer

11.5 If the buyer indicates that he will not enter the contract unless certain stipulations are met, those stipulations are likely to be treated as terms.

11.6 ***Bannerman v. White*** **(1861) 10 CB NS 844**

A buyer of hops asked if sulphur had been used in their cultivation, adding that, if it had, he would not even bother to ask the price. He was assured that sulphur had not been used. This was held to be a term.

11.7 ***Couchman v. Hill*** **[1947] KB 554 (CA)**

The plaintiff wished to buy a heifer which was described in the auction catalogue as being unserved (i.e. not mated). He verified this with both the owner of the heifer and the auctioneer before the sale as he did not wish to buy it otherwise. When the heifer died from a miscarriage seven weeks later, the plaintiff successfully sued the owner for breach of warranty, despite the fact that the catalogue said that no warranty was given as to the condition of the stock.

11.8 ***Oscar Chess v. Williams*** **[1957] 1 WLR 370**

The defendant sold a car described as a 1948 Morris 10. In fact, it was a 1939 model, worth rather less. It was held that this was not a term. The buyer might still have entered into the contract if he had known the truth, though he would have paid less.

Express Terms and Representations – Special Knowledge

11.9 Where a representation is made to someone who ought to know the truth at least as well as the representor, the statement is less likely to be treated as a term. Thus if a consumer sells his car to a car dealer, the court is likely to assume that the dealer will buy the car based on his own knowledge and experience, not what the consumer tells him; but if a dealer sells a car to a consumer, the consumer may be entitled to believe that what he is told by the supposed expert is a term of the contract.

11.10 ***Oscar Chess v. Williams*** **[1957] 1 WLR 370** (see above at 11.8)

The court found it to be significant that the seller was relying in good faith on the forged log-book and was dealing with a company of motor dealers who could have got the information checked themselves.

"The seller did not intend to bind himself so as to warrant the car was a 1948 model. If the seller was asked to pledge himself to it, he would at once have said 'I cannot do that. I have only the log-book to go by, the same as you'." per Denning L.J. at p 376

11.11 ***Dick Bentley Productions Ltd v. Harold Smith (Motors) Ltd*** **[1965] 2 All ER 65 (CA)**

A dealer sold a Bentley car, claiming that it had done only 20,000 miles since a replacement engine was fitted. In fact, it has done nearly 100,000. His statement was held to be a warranty since he was in a better position to know the truth than the buyer.

11.12 ***Drake v. Thos Agnew & Sons Ltd*** **[2002] EWHC 294**

Richard Drake, a Texan millionaire, asked Callan, an art dealer, to acquire for him an Old Master to add to his art collection. Callan bought from Agnew's, a well-known specialist in Old Masters, a painting described as being "by Sir Anthony van Dyck". The price was £2,000,000. Callan was due a commission from Drake of 5% to 10%.

Agnew's had bought the painting from Sotheby's, who had described it in their catalogue as being "after Sir Anthony van Dyck", which indicated that it was a copy. In fact, there had been considerable expert debate about the painting's provenance. Agnew's did not point this out to Callan, but they did volunteer to answer any questions Callan may have about the painting before purchase, and he could easily have researched the provenance himself as the debate was well documented.

The painting was not by van Dyck, but it was held that Agnew's statement that it was did not amount to a term of the contract, even under section 13 of the Sale of Goods Act 1979. Callan, as an art dealer, ought to have known that the statement was merely an opinion which he should verify himself. (In fact, Callan was a rogue who was deliberately ignoring the problems with the provenance to ensure his commission from Drake.)

"In general mere expressions of opinion or belief are not contractual; without more they do not become terms of any subsequent contract. Clearly one party may be so confident in his opinion, for example, as to the authenticity or origin of an object or painting that he is prepared to contract on that basis. He may have good commercial reasons for doing so. But in such cases an objective assessment of all the circumstances must point to that conclusion.

"The conclusion must be that the common intention of the parties was that the content of the opinion or belief was to become a term of the contract. The obvious and sensible way to achieve that result is to say so; but the courts are often called upon to resolve cases in which the parties have not so clearly expressed their intention and although it may be tempting, it is not always just to conclude that they did not have the necessary intent simply because they did not express it.

"Obviously Agnew's references to the painting as 'by van Dyck' or 'a van Dyck' were expressions of opinion. No one could sensibly have believed that Agnew's knew, or had some magic formula for establishing, that van Dyck himself had painted the canvas. Insofar as it may be necessary for me to find that Mr Drake and Mr Callan both understood that, I do. Mr Drake was a serious collector and Mr Callan a dealer." per Buckley J at paras 25-26

III TYPES OF TERM AND TYPES OF BREACH

12 CONDITIONS, WARRANTIES AND INNOMINATE TERMS

12.1 Terms of a contract have traditionally been divided into two categories: conditions and warranties, though since 1962 the courts have also identified innominate terms.

Conditions

12.2 *Conditions* are generally those terms which go to the root of the contract: terms without which the contract would make no commercial sense. Thus if there were a contract to purchase a computer with a term that it had a particular memory capacity, that would probably be a condition, as such matters are usually of primary importance to the purchasers of computers.

12.3 Terms are sometimes designated as conditions for other reasons – such as trade practice or because a statute makes them so. This is discussed below.

Warranties

12.4 *Warranties* are generally those terms which do not go to the root of the contract, but which are nevertheless part of the contractual specification. Thus if one were to purchase a computer set which included a computer, a screen and a mouse, but the mouse proved to be faulty, whilst this would certainly be a breach of contract, it might not be considered to be a major issue in the context of the entire purchase, especially as it could easily be rectified.

Innominate Terms

12.5 Since 1962 there has been a third category known as an *innominate term* or an *intermediate term*. These are terms which do not fit into either the category of condition or warranty, usually because the term could be breached with varying degrees of severity. A time of delivery clause is a good example, as whether something is delivered 5 seconds or 5 years late, it is technically breach of the same term, but will not necessarily give rise to the same remedy. Of course, such ambiguous terms have always existed, but in the past the courts would have retrospectively designated them as conditions or warranties to ensure that the correct remedy was given, even though this made no real sense, as a court is meant to be able to tell which terms are which from the contract itself – not only from the effect of the breach.

12.6 Note that both the words “condition” and “warranty” are used elsewhere in contract law with different meanings. For example, “condition” can refer to the required quality of goods, and “warranty” can mean guarantee.

13 TYPES OF BREACH

13.1 When a party to a contract does not perform his obligations – without lawful excuse – he is said to be in breach of contract. Disputes sometimes arise as to which of the parties in a failed contract was actually in breach, and claims are often met by counterclaims. For example, *Force India Formula One Team Ltd v. Etihad Airways PJSC* [2010] EWCA Civ 1051 where neither side performed the contract as required, but both blamed this on the repudiatory breach of the other.

13.2 The standard legal remedy for breach of contract is damages, though exceptionally specific performance may be awarded in equity. However, some breaches give the injured party the right to cancel the contract as well as claim damages. These are called repudiatory breaches. The injured party is not obliged to cancel (though in practice this may be the only possibility). He may elect either to accept the repudiation (i.e. to terminate the contract) or to affirm the contract, in which case the contract will continue and he will lose the right to terminate.

13.3 Some judges (and Treitel) refer to “the election to accept the repudiation” as “the right to rescind”. Some academics think this is confusing, as rescission normally refers to the remedy available for misrepresentation of restoring the parties to their pre-contractual position, which might not happen when a repudiatory breach is accepted and the contract is terminated. However, this is unduly pedantic. In fact, in many terminated contracts – especially sale of goods contracts – the termination leads to an effective rescission, because the buyer returns the goods and gets his money back.

13.4 Furthermore, the word “rescission” is now often used more generally than in misrepresentation cases, including by Parliament.[3]

14 EFFECT OF THE BREACH OF DIFFERENT TERMS

Breach of a Condition

14.1 Breach of condition will always be a repudiatory breach, so it gives the victim:

- the right to accept the repudiation (i.e. to terminate the contract)
- the possibility of claiming rescission (i.e. to return the goods and demand a refund) and
- the right to claim damages for breach.

14.2 The victim is not obliged to accept the repudiation. He may instead affirm the contract and just claim damages.

Breach of a Warranty

14.3 Breach of warranty gives the victim only the right to damages. The breach will not be repudiatory.

14.4 Whether a term is a condition or a warranty should be discernible at the time the contract is made. A simple test is to say that a condition is a major term of the contract whilst a warranty is a minor term. This test will often work, but is by no means infallible for very minor breaches may sometimes be classified as conditions. Furthermore, with some terms it is impossible to tell until the breach whether the term was an important one or not. These ambiguous terms have recently been recognised as intermediate or innominate terms, and form a third category.

Breach of an Innominate Term

14.5 Breach of an innominate term may or may not be repudiatory. The court will decide by considering what effect the breach has had on the contract.

15 THE DISTINCTION BETWEEN CONDITIONS AND WARRANTIES

The Commercial Importance of the Term

15.1 If a buyer makes it clear that he will not buy the goods at all unless they are of a certain quality, this will tend to support the view that a term as to that quality is a condition. Where there is no such evidence of intention, the court will consider its own views on the commercial importance of the term. The court will not be looking for precise words, but as to what the parties objectively meant the term to be as a matter of good business sense, taking account of the contract as a whole.

15.2 ***Glaholm v. Hays*** **(1841) 2 Man & G 257**

By a memorandum of charter, it was agreed that a ship should proceed to Trieste, and there load a full cargo, and being so laden should proceed to a port in the United Kingdom, and deliver the same, upon payment of freight. The vessel was to sail from England on or before the 4th of February.

The issue was whether the sailing on or before the 4th of February was a condition precedent. It was held so to be.

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[3] For example, Regulation 15 The Electronic Commerce (EC Directive) Regulations 2002.

"Whether a particular clause in a charter-party shall be held to be a condition, upon the non-performance of which by the one party, the other is at liberty to abandon the contract, and consider it at an end; or whether it amounts to an agreement only, the breach whereof is to be recompensed by an action for damages, must depend upon the intention of the parties to be collected, in each particular case, from the terms of the agreement itself, and from the subject matter to which it relates. "It cannot depend," as Lord Ellenborough observes, "on any formal arrangement of the words, but (must depend) on the reason and sense of the thing as it is to be collected from the whole contract." …

"And looking at the subject matter of the contract, without regarding the precise words, we think that construing the words as a condition precedent, will carry into effect the intention of the parties, with more certainty, than holding them to be matter of contract only, and merely the ground of an action for damages.

"Both parties were aware that the whole success of a mercantile adventure does, in ordinary cases, depend upon the commencement of the voyage by a given time. The nature of the commodity to be imported, the state of the foreign and home market at the time the contract of charter-party is made, and the various other calculations which enter into commercial speculations, all combine to shew, that dispatch and certainty are of the very first importance to their success; and certainly nothing will so effectually insure both dispatch and certainty, as the knowledge that the obligation of the contract itself shall be made to depend upon the actual performance of the stipulation which relates to them…

"Upon the whole, therefore, we think the intention of the parties to this contract sufficiently appears to have been, to insure the ship's sailing at latest by the 4th of February, and that the only mode of effecting this is by holding the clause in question to form a condition precedent; which we consider it to have been." per Tindall, C.J. at pp.267-269

15.3 ***Couchman v. Hill*** **[1947] 1 All ER 103 (CA)**

It was held that if a contractual term relates to a substantial ingredient in the identity of the thing sold, it will be treated as a condition.

15.4 Before the 'discovery' of the innomimate term, courts would sometimes determine whether a term was a condition or a warranty based on whether the breach was fundamental to the contract, rather than on whether it was clearly an important term at the time the contract was made. In fact, in the two supposed leading cases on the distinction between conditions and warranties, the same court in the same year was asked to construe two virtually identical terms in two different contracts, and held that one was repudiatory and one was not. It is notable that the court did not actually use the words 'condition' or 'warranty' in either case!

15.5 ***Poussard v. Spiers*** **(1876) 1 QBD 410**

Mme Poussard was engaged by Spiers to play the leading part of Friquette in a new opera which was to open at the Criterion Theatre on 28 November 1874, and which was to run for up to three months. On 23 November, she fell ill and was unable to attend rehearsals. On 25 November, Spiers entered into a contract with Miss Lewis, by which she was to play the part from 28 November to 25 December if Mme Poussard had not recovered by the opening night. Mme Poussard continued ill until 4 December, when she asked for her part back, but was refused.

Mme Poussard claimed that her contract had been wrongfully repudiated. It was held that Spiers was entitled to cancel Mme Poussard's contract. The requirement for her to be available for rehearsals and on the opening night was a condition of the contract which she had breached.

In fact, the court's main emphasis was on the fact that Mme Poussard's illness was "a serious one of uncertain duration" so it was uncertain whether she would make it back at all. The court also said it was unreasonable to expect Spiers to find a temporary substitute "capable of performing the part adequately", which was odd since that is precisely what Spiers had done. Why could Mme Poussard NOT have taken over from Miss Lewis on 26 December? The concern of the court with the particular circumstances of the breach might suggest that the court was really treating the term as to attendance as an innominate term, judging it by the outcome of the breach rather than on the presumed intention of the parties when the contract was made.

15.6 ***Bettini v. Gye* (1876) 1 QBD 183**

Gye, the director of the Royal Italian Opera at Covent Garden, engaged Bettini to sing in concerts and operas "to fill the role of primo tenor assoluto in the theatres, halls and drawing rooms in Great Britain and Ireland" from 30 March to 13 July 1875. He was required "to be in London without fail at least six days before the commencement of his engagement for the purpose of rehearsals". Bettini was prevented by temporary illness from being in London until 28 March. He gave no advance notice of this delay to Gye, and when he arrived in London, Gye refused to accept his services.

It was held that this refusal was unjustified. Bettini was only in breach of a warranty, not a condition, as missing a few rehearsals was not significant to a 15-week season.

This case may be distinguished from *Poussard v. Spiers* on several grounds. Bettini was not playing a particular role; there was no suggestion of a substitute; he was available for the actual performances; there was no uncertainty about his future availability. However, the term he breached was very similar to the one breached by Mme Poussard.

Was it not the consequences of the breach that led the court to find that this was not repudiatory, rather than whether it was a condition or a warranty?

15.7 A case which clearly indicates that the court will sometimes decide on the importance of a term retrospectively is…

***Aerial Advertising Co v. Batchelor's Peas Ltd (Manchester)* [1938] 2 All ER 788**

A agreed to conduct an advertising campaign for B by flying over various towns trailing behind the aeroplane a banner saying "Eat Batchelor's Peas." The pilot, Captain Michelmore, was meant to confirm with Mr Batchelor the proposed schedule for each day, and this he generally did, it being agreed that flying between 10.00 am and 12.00 noon was best for maximum effect.

On 11 November 1937, the pilot failed to contact Batchelor, but flew on his own initiative over Manchester and Salford at 10.45 am. Unfortunately, this was Armistice Day, and the aeroplane towed the banner over the main square of Salford at the precise time when a large crowd was gathered there observing the two-minute silence. The effect of this breach of contract was described as "disastrous" as letters poured into Batchelor's threatening to boycott its products. It was held that B was justified in refusing to accept further performance of the contract, even after the fuss had died down.

This was surely a case of deciding the importance of a term after the breach.

Commercial Certainty

15.8 Terms are sometimes treated as conditions not because of the potential seriousness of a breach, but in order to promote commercial certainty.

15.9 ***Behn v. Burness* (1863) 1 B&S 751**

A statement in a charterparty as to the whereabouts of a ship was held to be a condition, since this is the common understanding of charterers.

15.10 ***The Mihalis Angelos: Maredelanto Compania Naviera SA v. Bergbau-Handel GmbH* [1971] 1 QB 164 (CA)**

A statement that a ship is "expected ready to load" will usually be taken to be a condition, as this is the general commercial understanding.

15.11 The certainty test may also be used with some continuing contracts which call for repeated acts of performance over a period of time.

Bradford v. Williams **(1872) LR 7 Ex 259**

The plaintiffs chartered the defendants' ship from May to May, but in September they wrongfully refused to provide a cargo. It was held that this refusal justified the defendant in putting an end to the contract. Unless the contract was brought to an end, it would be open to the plaintiff to insist on having a ship available at any time, and it was unfair to expect the defendants to keep a ship available just in case.

Express Classification by the Parties

15.12 A court will usually deem a term to be a condition if the parties so describe it, but this is not invariably the case.

15.13 ***Wickman Ltd v. Schular AG*** **[1974] AC 235 (HL)**

In May 1963 the appellants, German manufacturers, agreed to give the respondents, an English company, the sole selling rights for panel presses made by them for 4½ years.

Clause 7 (b) of the contract provided that 'It shall be a condition of this agreement that (i) [the respondents] shall send its representatives to visit' the six largest United Kingdom motor manufacturers 'at least once in every week' to solicit orders for panel presses. No other of the 20 clauses of the agreement was described as a condition.

During the first eight months the respondents failed in the visiting obligation on a scale which the arbitrator in the consequential arbitration found to be a 'material breach' but the evidence showed that it was treated as remediable under clause 11 (a) (i), which provided that either party could terminate the agreement if the other committed a material breach of its obligations and failed to remedy it within 60 days of being required to do so; and he found that those breaches had been waived.

In the next six months there were immaterial breaches of the obligation, some for good reasons; but in July 1964 the appellants claimed the right to terminate the contract under clause 11 (a) (i) and terminated it in October 1964 on the basis that the respondents were in breach of a condition.

The respondents claimed damages for wrongful repudiation, claiming that the term was not a condition in the literal sense.

HELD: The word condition had acquired more than one meaning in contracts, and in the present agreement, in relation to the continuing visiting obligation, its meaning was equivocal. It was not a condition in the primary sense of being used as a term of art such that a single breach of it, however trivial and however long past, would, in the absence of any waiver, entitle the innocent party to terminate the whole contract forthwith.

The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.[4]

"Schuler maintains that the use of the word 'condition' is in itself enough to establish this intention. No doubt some words used by lawyers do have a rigid inflexible meaning. But we must remember that we are seeking to discover intention as disclosed by the contract as a whole. Use of the word 'condition' is an indication - even a strong indication - of such an intention but it is by no means conclusive.

"The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.

[4] see also *Rice T/A The Garden Guardian v. Great Yarmouth Borough Council* [2001] 3 LGLR 4 (CA) below at 15.24.

"Clause 7 (b) requires that over a long period each of the six firms shall be visited every week by one or other of two named representatives. It makes no provision for Wickman being entitled to substitute others even on the death or retirement of one of the named representatives. Even if one could imply some right to do this, it makes no provision for both representatives being ill during a particular week. and it makes no provision for the possibility that one or other of the firms may tell Wickman that they cannot receive Wickman's representative during a particular week. So if the parties gave any thought to the matter at all they must have realised the probability that in a few cases out of the 1,400 required visits a visit as stipulated would be impossible. But if Schuler's contention is right, failure to make even one visit entitle them to terminate the contract however blameless Wickman might be.

"This is so unreasonable that it must make me search for some other possible meaning of the contract. If none can be found then Wickman must suffer the consequences. But only if that is the only possible interpretation." per Lord Reid at p.257

Statutory Classification

15.14 In some cases, the question of whether a term is a condition or a warranty is determined by statute. The best example was the Sale of Goods Act 1979 which made "satisfactory quality" an inalienable condition of all consumer contracts for the sale of goods. This has now largely been replaced by the Consumer Rights Act 2015, which is discussed later.

Intermediate (Innominate) Terms

15.15 In (comparatively) recent times, the courts have recognised that certain terms cannot be classified as warranties or conditions merely by looking at the contract, as a breach of the same term might be very minor or very serious, depending on the actual circumstances. In those cases, the courts will look at the actual consequences of the breach to decide whether or not to allow rescission.

15.16 ***Hong Kong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha Ltd*** **[1962] 2 QB 26 (CA)**

The plaintiffs chartered a ship to the defendants for a period of 24 months. Her engine-room staff was incompetent and her machinery was ancient. From these causes 20 weeks were lost. The defendants claimed to treat the contract as at an end as the ship was not "seaworthy". The plaintiffs sued for wrongful repudiation. The Court of Appeal held that although there was clearly a breach of contract, it could not be said that the seaworthy clause was either a condition or a warranty. In fact, the correct and fair remedy depended upon the seriousness of the effect of the breach. In this case, the effects were not so serious as to justify repudiation.

"There are many contractual undertakings…which cannot be categorised as being 'conditions' or 'warranties'… Of such undertakings, all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which was intended that he should obtain from the contract; and the legal consequences of a breach of such an undertaking, unless provided for expressly in the contract, depend on the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking as a 'condition' or a 'warranty'." per Diplock L.J. at p 70

Applying this test, the Court of Appeal held that the defendants were not entitled to rescind, as twenty weeks lost out of 24 months was not sufficiently "substantial"! This might have been because the defendants wanted to get out of the contract because the freight rates had fallen and they were looking for any excuse to do so!

15.17 The "new" type of term was questioned in *The Mihalis Angelos* [1971] in which it was held that a readiness to load clause in a shipping contract would always be a condition, even though the effects of a breach (i.e. a ship not ready to take its cargo) were extremely variable. However, this was a policy decision to promote commercial certainty in a particular industry dealing with massively expensive deals where the players need to know their precise rights at all times.

15.18 ***The Mihalis Angelos, Maredelanto Compania Naviera SA v. Bergbau-Handel GmbH*** **[1971] 1 QB 164 (CA)**

A differently constituted Court of Appeal held that the "expected readiness to load" clause in a charterparty was not an innominate term, but was a condition. This led to some confusion about the status of the "innominate term" in contract law.

15.19 The matter was resolved in *The Hansa Nord*, where the Court of Appeal confirmed that innominate terms existed to supplement the traditional classification, not to replace it.

15.20 ***The Hansa Nord, Cehave NV v. Bremer Handelsgesellschaft mbH*** **[1976] QB 44 (CA)**

The Court of Appeal reconciled the two previous cases saying that a term will be a "condition" or a "warranty" if this is expressly or impliedly provided for in the contract or by statute or precedent. However, where it is not possible to discern the status of a term in this way it will be an "innominate term". If it is breached, the right to rescind will depend on whether the breach has substantially deprived the innocent party of what it was intended he should get under the contract. If not, the victim will be entitled only to damages.

In the case it was held that a clause requiring citrus pulp pellets to be delivered in "good condition" was an innominate term, and, in the circumstances, delivery in bad condition did not give the buyer the right to rescind as the breach had not gone to the root of the contract. The pellets had been meant for use as part of compound feed, and could still be used for that purpose, although they now had to be mixed using smaller percentages.

15.21 The Court of Appeal decisions gained House of Lords approval in:

Bunge Corporation v. Tradax Export SA **[1981] 1 WLR 711 (HL)**

Whilst upholding the idea of the innominate term, the House of Lords held that a time of performance clause in a mercantile contract should be treated as a condition for the sake of commercial certainty.

"[The argument that the term is an innominate term] is based on a dangerous misunderstanding, or misapplication, of what was decided and said in Hong Kong Fir. That case was concerned with an obligation of seaworthiness, breaches of which had occurred during the course of the voyage. The decision of the Court of Appeal was that this obligation was not a condition, a breach of which entitled the charterer to repudiate. It was pointed out that, as could be seen in advance, the breaches which might occur of it were various.

"They might be extremely trivial, the omission of a nail; they might be extremely grave, a serious defect in the hull or in the machinery; they might be of serious but not fatal gravity, incompetence or incapacity of the crew. The decision, and the judgments of the Court of Appeal, drew from these facts the inescapable conclusion that it was impossible to ascribe to the obligation, in advance, the character of a condition…

"The fundamental fallacy of the appellants' argument lies in attempting to apply this analysis to a time clause such as the present in a mercantile contract, which is totally different in character. As to such a clause there is only one kind of breach possible, namely, to be late, and the questions which have to be asked are, first, what importance have the parties expressly ascribed to this consequence and, secondly, in the absence of expressed agreement, what consequence ought to be attached to it having regard to the contract as a whole…

"The introduction of the Hong Kong Fir test would be commercially most undesirable. It would expose the parties, after a breach of one, two, three, seven and other numbers of days to an argument whether this delay would have left time for the seller to provide the goods. It would make it, at the time, at least difficult, and sometimes impossible, for the supplier to know whether he could do so. It would fatally remove from a vital provision in the contract that certainty which is the most indispensable quality of mercantile contracts, and lead to a large increase in arbitrations…

"The courts should not be reluctant, if the intentions of the parties as shown by the contract so indicate, to hold that an obligation has the force of a condition, and indeed they should usually do so in the case of time clauses in mercantile contracts." per Lord Wilberforce at p 715

15.22 *Bunge Corporation v. Tradax Export SA* [1981] was considered in the following case.

The Aktor, PT Berlian Laju Tanker TBK v. Nuse Shipping Ltd **[2008] 2 All ER (Comm) 784 (QBD Commercial Court)**

Nuse Shipping contracted to sell a ship (The Aktor) to PTB for US$8,400,000, cash on delivery. Under the terms of the contract 10% of the purchase price was to be held as a deposit in a bank in Singapore, but the whole price was to be paid to a bank in Greece on delivery of the ship. Before delivery, the buyers indicated that they only intended to pay 90% of the price into the Greek bank, and that the sellers would have to get the rest from the bank in Singapore. The sellers regarded this as an anticipatory breach of a condition, and terminated the contract.

The buyers claimed, inter alia, that even if there was a breach it could only have been of an innominate term, as the effect of varying the manner of payment did not necessarily go to the root of the contract.

The court held that it was clear mercantile practice to regard the provisions regarding the manner of payment as a condition, and so it must be held to be, whatever the actual consequence of the breach.

Current Trends on the Classification of Terms

15.23 Mercantile practices aside, it can be difficult these days to steer the court away from the conclusion that most terms are actually innominate.

15.24 ***Rice T/A The Garden Guardian v. Great Yarmouth Borough Council*** **[2001] 3 LGLR 4**

In February 1996, the GG entered into a standard form contract with the council to provide leisure management and grounds maintenance services for a four year period. GG was a small business which had been invited to tender for this contract and, having got it, borrowed substantial sums of money to make the necessary investment in equipment and to increase its workforce. Amongst the provisions of the contract were the following terms:

Clause 6: During the contract period, the contractor shall provide the service in a proper and skilful and workmanlike manner, to the contract standard and to the entire satisfaction of the authorised officer.

Clause 23: If the contractor commits a breach of any of its obligations under the contract, the council may, without prejudice to any accrued rights or remedies under the contract, terminate the Contractor's employment under the Contract by notice in writing with immediate effect.

The council were not satisfied with GG's work. In particular, the summer bedding was not completed in time and some of the football pitches were not ready for the start of the season. On 2 August 1996, the council invoked the termination clause and cancelled the contract. GG claimed that clause 6 was an innominate term and not a condition, and as there had not been a major breach of the contract, the council was not entitled to repudiate, despite clause 23.

Held: This was a classic example of an innominate term – one which could be broken in so many different ways and with such varying consequences that the parties could not be taken to have intended that any breach should entitle the innocent party to terminate the whole contract. As the cumulative effect of the breaches did not justify a termination of the contract, the council was liable to the Contractor for wrongful termination. Clause 23 could not be taken to be meant to be as draconian as it seemed.

IV IMPLIED TERMS

16 INTRODUCTION

16.1 "Implied terms" are terms which are part of a contract even though they have not been expressed by the parties. (Terms to which the parties expressly agree are called "express terms". Implied terms are inferred into a contract as a matter of law, whether or not the parties are even aware of them. If one were to be pedantic, they should really be called "inferred terms", but they are not, and never have been!

16.2 Terms may be "implied" either at common law or under statute. The courts have shown an increasing reluctance to find implied terms in commercial agreements (other than those imposed by statute) presuming that if the parties are dealing at arms-length, they will have included all the terms they thought necessary.

16.3 Sir Thomas Bingham MR (as he then was) explained in *Phillips Electronique Grand Public SA v. British Sky Broadcasting Ltd* [1995] EMLR 472 at 481 that there was a high threshold for implying the alleged terms as: *"…it is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred."* (para 56)

16.4 As far as consumer contacts are concerned, these are largely governed by stature, most notably now by the new Consumer Rights Act 2015, which to some extent has replaced the Sale of Goods Act 1979 in this respect.

16.5 Terms implied by the courts at common law are sometimes divided into two categories: terms implied "in fact" and terms implied "in law". This is a little confusing as, of course, all terms must be implied "in law", but the distinction relates to terms which are implied on the basis that "in fact" the parties must have meant to include them (as the contract would otherwise make no commercial sense); as opposed to terms which are implied purely as a matter of public policy, even though it is unlikely that both parties would have agreed on the point.

16.6 There are two tests used by the courts for determining whether a term should be implied "in fact", though recent cases suggest that they are just different ways of expressing the same idea.

17 TERMS IMPLIED BY THE COURTS 'IN FACT'

The Business Efficacy Test

17.1 A term will be implied into a contract if "in fact" the parties must (objectively) have meant it to be there, as the contract would make no business sense without it.

17.2 ***The Moorcock* (1889) 14 PD 64**

This case established the so-called "business efficacy" test. A mooring had been hired for a steamship called The Moorcock in the tidal part of the Thames. When the tide went out, the ship grounded and was damaged. The owners of the jetty claimed that they were not responsible as they had never said that the berth would be safe for the ship when the tide went out. The court held that the jetty owners were liable, as there was an implied term that the mooring would be safe.

"In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men.

"I think if they let out their jetty for use they imply that they have taken reasonable care to see whether the berth, which is the essential part of the use of the jetty, is safe, and if it is not safe, and if they have not taken such reasonable care, it is their duty to warn persons with whom they have dealings that they have not done so." per Bowen L.J.

17.3 In other words, whilst you can make a contract where one party accepts the risk that the goods or services will be unsuitable for their obvious use, this would have to be stated in the contract. Otherwise, business sense would imply that the products or services are suitable for their obvious use.

17.4 The term implied must be necessary for the contract to make sense. It will not be implied simply to make the contract more reasonable or more convenient.

17.5 ***Bell v. Lever Brothers*** **[1932] AC 161 (HL)**

"Nothing is more dangerous than to allow oneself liberty to construct for the parties contracts which appear to make the contract more businesslike or more just. The implications to be made are to be no more than are "necessary" for giving business efficacy to the transaction." per Lord Atkin at p.218

17.6 ***Attorney General of Belize v. Belize Telecom Ltd*** **[2009] UKPC 10**

Belize Telecommunications Authority was a public body which had been the monopoly provider of telecommunication services in Belize. In order to facilitate the partial privatisation of these services, a company called Belize Telecommunications Ltd was formed. The Articles of Association provided as follows:

"The holder of the Special Share shall, so long as it is the holder of C Ordinary shares amounting to 37.5% or more of the issued share capital of the Company be entitled at any time by written notice served upon the Company to appoint two of the Directors designated C Directors and by like notice to remove any Director so appointed and appoint another in his or her place."

The majority shareholder in BT appointed several directors on the basis of having such a shareholding (which was acquired from the Belize government), but defaulted on the shares and had to return most of them. The issue was whether there was an implied term in the articles that the directors appointed by the shareholder would have to vacate their offices if the shareholder no longer had the qualifying shares on which he had appointed them. The answer was yes.

"Before discussing in greater detail the reasoning of the Court of Appeal, the Board will make some general observations about the process of implication. The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed." per Lord Hoffman at para 16

17.7 If the contract has a section which deals with a specific issue (such as termination), the court may be disinclined to imply extra clauses into the section, as they will assume that if the parties had intended to cover other related matters, they would have said so, and that the omission was, therefore, deliberate.

17.8 ***ServicePower Asia Pacific Pty Ltd v. ServicePower Business Solutions Ltd*** **[2010] 1 All ER (Comm) 238**

The applicant company (SBS) was a subsidiary of a group which provided computer software designed to optimise the provision of field services (i.e. the reporting of product faults and the dispatch of an engineer to repair them). The respondent company (SPAP) had entered into a contract with the applicant to gain the exclusive rights of distribution of the software in Australia and New Zealand. The contract provided that it would last for two years, and then automatically renew every year until it was terminated in accordance with section 20 of the contract.

Following a dispute, the applicant purported to terminate the contract by giving "reasonable notice" claiming that this was permitted by an implied term in the contract. The respondent claimed that there was no such term and that the termination was, therefore, ineffective.

The applicant sought a summary declaration, inter alia, that the respondent's claim was so ill-conceived in law that there was no possible chance of it succeeding in a full hearing.

The applicants' case was that it would not make business sense to have a renewable contract which would last forever, so that section 20 (which dealt only with termination for breach and insolvency) could not have been meant to be exclusive. Therefore, there must be implied a term that the contract could be terminated by reasonable notice, as well as by the methods mentioned in the contract. In addition, if the contract were meant to be interminable, then there would be no meaning to the renewal clauses.

The respondents' case was that section 20 of the contract was an elaborate termination clause which gave several ways in which the contract could be terminated for breach and insolvency, but did not mention termination by "reasonable notice". The fact this had been omitted, they claimed, meant that it could not then be implied as it would have been expressly included if the parties had meant it to be there.

Regarding the whole business context of the agreement, the court held that there was at least an answerable case that the contract contained all the terms with no room for any implied terms (as the respondent had submitted), and so the application on that point was rejected.

"It is only appropriate for me to grant summary judgment in favour of SBS on this issue if there is no real prospect that SPAP will succeed in its claim for the first declaration sought. I am unable to reach that conclusion. In my view, SPAP has a real prospect of establishing at trial that, the parties having given detailed expression to circumstances in which the Agreement is terminable, there is no room for the implication of any further term.

"I am not satisfied that section 6 is necessarily inconsistent with such an argument: like many other aspects of the Agreement it may just have been inelegantly conceived and expressed. Furthermore, the commercial absurdity of an exclusive licence, which is not terminable on reasonable notice, is less obvious in circumstances in which the right to exclusivity is dependent on the achievement of the market development obligations described in section 7.2(b) of the Agreement."

per William Trower QC (Deputy Judge) at para 31

18 TERMS IMPLIED BY THE COURTS 'IN FACT'

The Officious Bystander Test

18.1 The "officious bystander" test describes the doctrine that a term should be implied into a contract if it is clear that the only reason it has not been expressly included is that it is "so obvious that it goes without saying". This clearly overlaps with the "business efficacy" test, and it is arguable that it is actually just another way of expressing the same thing. This is discussed below. The expression "officious bystander" comes from the case of *Shirlaw v. Southern Foundries (1926) Ltd* [1939].

18.2 ***Shirlaw v. Southern Foundries (1926) Ltd*** **[1939] 2 KB 206 (CA)**

This case established the so-called "officious bystander" test. In 1933, Shirlaw was appointed to be managing director of SF for ten years. His contract required him also to be a director of the company. In 1935, SF was taken over by Federated Foundries Ltd whose articles allowed the removal of a director by an instrument subscribed by two other directors and the company secretary. Shirlaw was removed as a director by FF, which meant that he also lost his job as managing director under the terms of his contract.

The Court of Appeal held that there had been a breach of two implied terms:

(i) that the company should not remove S from his position of director during his ten year contract; and
(ii) that the company would not alter its articles of association to enable someone else to remove him from his position of director.

"I recognise that the right or duty of a Court to find the existence of an implied term…in a written contract is a matter to be exercised with care; and a Court is too often invited to do so upon vague and uncertain grounds. Too often also such an invitation is backed by the citation of a sentence or two from the judgment of Bowen L.J. in The Moorcock. They are sentences from an extempore judgment as sound and sensible as all the utterances of that great judge; but I fancy that he would have been rather surprised if he could have foreseen that these general remarks of his would come to be a favourite citation of a supposed principle of law…

"For my part, I think there is a test that may be at least as useful as such generalities… Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain an officious bystander were to suggest some express provisions for it in their agreement, they would testily suppress him with a common, 'Oh, of course'. At least it is true, I think, that, if a term were never implied by a judge unless it could pass that test, he could not be held to be wrong." per MacKinnon L.J. at p 227

19 TERMS IMPLIED BY THE COURTS 'IN FACT'
One Test or Two?

19.1 There has been some debate about whether the "business efficacy" test is, in fact, the same thing as the "officious bystander" test. Even MacKinnon LJ's judgment suggests that they are the same, as do several later cases which elide them.

19.2 ***Trollope & Colls Ltd v. North West Metropolitan Regional Hospital Board*** **[1973] 1 WLR 601 (HL)**

"[T]he court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable.

"An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves."

per Lord Pearson at p 609

19.3 ***Attorney General of Belize v. Belize Telecom Ltd*** **[2009] UKPC 10**

"It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. It will be noticed from Lord Pearson's speech that this question can be reformulated in various ways which a court may find helpful in providing an answer – the implied term must 'go without saying', it must be 'necessary to give business efficacy to the contract' and so on – but these are not in the Board's opinion to be treated as different or additional tests.

"There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?" per Lord Phillips at para 21

19.4 However, several other cases suggest that the tests are separate and different from each other.

19.5 First, there have been cases where both tests were applied separately:

19.6 ***Ashmore and Others v. Corporation of Lloyd's (No 2)*** **[1992] 2 Lloyd's Rep 620**

The court in this case considered the operation of both the "business efficacy" test and the "*officious* bystander" test. The Lloyd's "names" who had made considerable losses out of insurance contracts claimed that there was an implied term in these contracts that they should have been alerted to any matters which might have adversely affected their interests. Gatehouse J found that neither test applied. The contracts were workable without the implied term (so the first test did not apply) and the question that an "officious bystander" might ask would have to be so complex that it would be unlikely to evince the simple answer "oh, of course".

The question in question was this:

"If something professionally discreditable is or becomes known to Lloyd's about the underwriting agent which might prejudice the member's underwriting interests, other than matters which in Lloyd's reasonable opinion are not capable of being seriously prejudicial to the member's underwriting interests, would you Lloyd's be obliged to take reasonable steps to alert the applicant, if thought necessary, in confidence, and tell the underwriting agent within a reasonable time thereafter what you have done?"

19.7 ***Mirror Colour Print (Oldham) Ltd v. Kershaw*** **(2004) UKEAT/0154/04**

Robert Kershaw was employed as a technician by MCP under a contract which required him to work four shifts in some weeks and three shifts in others. If he worked over his contract hours, he was entitled to overtime pay, but because of the shift system, his required contract hours changed from week to week so it was difficult to calculate what amounted to overtime.

The contract did not express how many hours per week he should have been working, but Kershaw contended that a "basic contract week" should be calculated by taking an eight week cycle and dividing it by eight. The employers contended that a "basic contract week" should be calculated by taking an annual cycle and dividing it by 52 (which would mean less overtime for the employee).

The Employment Appeal Tribunal (overturning the decision of the Employment Tribunal) held that no term as to how to define a "basic contract week" could be implied by operation of either The Moorcock or the Officious Bystander test, but that, given the ambiguity, the employers' calculation was the more obvious choice of the two.

"A term can only be implied into a contract if, firstly, the courts are spelling out what both parties know and would, if asked, unhesitatingly agree to be part of the bargain. As Mr Basu submits, if an officious bystander had suggested the term to the parties, would they have said 'of course'… Secondly, a term will be implied if it is necessary, in the business sense, to give efficacy to the contract. The Moorcock [1889] 14 PD 64, 68. Neither of the other possible routes for implication for terms i.e. custom and practice or implication by operation of law apply to the facts of this case.

"We cannot accept that the implied term set out by the Employment Tribunal passes the officious bystander test. Such an implied term cannot have been the unexpressed intention of the parties when, as we have set out above, both the agreement itself and the letters offering employment suggest that none of the parties intended the normal operation of the shift system to create overtime. Indeed, the response to the officious bystander would more likely have been one of puzzlement followed by 'certainly not'.

"Nor is this a case where the business efficacy test applies. As can be seen from the judgment of Bowen L.J. in The Moorcock terms are implied under this test where the law draws 'from what must have obviously have been the intention of the parties'. That cannot be the case here as such an implied term cannot be described as being obviously the intention of the parties for the reasons set out above." per Nelson J, paras 39-41

19.8 ***P&S Amusements Ltd v. Valley House Leisure Ltd*** **[2007] EWHC 1494**

P&S Amusements were the tenants of Gaiety's Bar and Night Club in Blackpool. They demised the premises to Findextra Ltd, who in turn assigned it to Mr and Mrs Valentine. The Valentines then assigned the lease to their company, Valley House Leisure Ltd. The underlease to Findextra contained a clause by which P&S were entitled to nominate suppliers to the premises of certain types of beer (the purpose of this was to get a commission from the brewery). The nominated suppliers were Scottish and Newcastle Breweries.

However, when VHL discovered that P&S were getting this commission, they renegotiated directly with the brewery so that they could get the commission instead.

At this, P&S nominated Carlsberg-Tetley instead, having reached a new commission agreement with them. However, VHL refused to change suppliers, and P&S sued them. P&S claimed, inter alia, that there was an implied term in the beer-tie contract that VHL would not negotiate with the nominated brewery to get the commission for itself.

In holding that this was not the case, Silber J pointedly treated the "business efficacy test" and the "officious bystander test" as two quite distinct issues.

On the first test he said that neither of the alleged implied terms should be implied to give business efficacy to the exclusive purchasing obligations:

"It is clear that the agreement was not only effective without the implied terms but also significantly that the agreements between the claimants and their tenants might well be ineffective with those alleged terms implied as there is the powerful trade evidence which I accept from Mr Richard Mills of John Smiths to the effect that his experience in the brewery trade for more than 35 years had led him to the conclusion that preventing tenants in the position of the first defendants from soliciting rebates from a brewery 'could simply not work. To say that it would give business efficacy to the agreement is in my view nonsensical. You simply cannot have a situation where the brewer has to supply to an outlet when he cannot discuss on a day to day basis the requirements for an outlet which would also include financial matters, promotional matters and the like…'" (para 42/46)

On the second test he said:

"The second reason why the proposed terms cannot be implied is that they fail to satisfy another of Lord Simon's conditions in the BP case (supra) which was that 'for a term to be implied…it must be so obvious that "it goes without saying"'."

19.9 Second, it appears that although the "business efficacy" test is objective, the "officious bystander" test is subjective. Thus, a term will not be implied under the second test if one of the parties can show that he personally did not intend for it to be part of the contract.

19.10 ***Spring v. National Amalgamated Stevedores and Dockers Society (NASDS)*** **[1956] 1 WLR 585**

A trade union argued that there was an implied term in a contract that one of its members should comply with the "Bridlington Agreement". As the member in question had never heard of this agreement, the argument was rejected.

20 TERMS IMPLIED BY THE COURTS 'IN FACT'

Current Practice

20.1 There have been a few recent cases where these issues have been discussed and it seems clear that the modern courts will imply terms only with reluctance. In particular, they will presume that a written commercial agreement contains all the terms of the contract unless there is clearly something missing,

20.2 ***Wilson v. Best Travel Ltd*** **[1993] 1 All ER 353**

In a contract between a tour company and a holiday maker, it was held that there was no implied term as to the safety of the hotel. Had the question been asked by an officious bystander, the tour company would not have said "of course" because they had no control over the hotel.

20.3 ***Jolley v. Carmel Ltd*** **[2000] 43 EG 185 (CA)**

By a contract of 7 August 1998, the claimant agreed to sell a derelict property to the defendant. Completion was subject to the defendant obtaining planning permission. Despite his best efforts, by November 1999 the defendant still had not obtained planning permission.

The claimant sought to rescind the contract on the basis that there was an implied term that planning permission would be gained within a reasonable time. Held: There was no such implied term and the claimant was not entitled to rescind the contract. If the parties had intended a cut-off date they could have expressly included one in the contract.

20.4 ***Luke v. Stoke on Trent City Council*** **[2007] EWCA Civ 761**

Miss Luke was a special needs teacher at a centre in Stoke. Her contract with the council was to work at that particular centre, and there was no express term in it permitting the council to send her to work elsewhere. Luke went off sick with stress, blaming the head teacher who, she claimed, had been harassing her.

An independent report was commissioned which proposed an action plan to facilitate Luke's return to work. However, the council would only permit her to return to the centre if she accepted that the report was accurate. Luke refused to do this, so the council found her comparable work at another centre. When she refused this too, they stopped her salary.

Luke sued the council for her salary, but the employment tribunal found that there was an implied term in her contract that the council could reasonably require her to work outside the centre, which she had breached by not doing so.

The Employment Appeals Tribunal also found in favour of the council, but without invoking the supposed implied term. They said it was preferable to resolve such issues within the express terms of the contract. Luke had unreasonably put herself in a position where she could not fulfil the express terms of her contract (to work at the centre) and if she was not prepared to work, there was no reason why she should be paid! (See also *Aspect Contracts (Asbestos) Ltd v. Higgins Construction plc [*2013] EWHC 1322 in which many of the key authorities are discussed.)

.20.5 ***Marks and Spencer plc v. BNP Paribas Securities Services Trust Co.*** **[2016] AC 742 (SC)**

Under four commercial leases, which had been negotiated and drafted by specialist solicitors, rent was payable "yearly and proportionately for any part of a year by equal quarterly instalments in advance" on the usual quarter days. Each lease contained a break clause allowing the tenant to terminate the lease on 24 January 2012 by giving the landlords six months' prior written notice, provided that, on the break date, there were no arrears of rent and the tenant had paid the landlords a break premium equivalent to one year's rent.

In early July 2011, the tenant served a break notice on the landlords. It then paid a full quarter's rent in December 2011 and the break premium a few weeks later. As a result of those payments, the break notice was effective and the lease determined on 24 January 2012. Subsequently the tenant claimed repayment of rent which it had paid for the period after the termination of the lease, on the basis that a term entitling it to such repayment should be implied into the lease. The judge allowed the claim.

The Court of Appeal allowed the landlords' appeal, holding that no such term could be implied into the lease.

The Supreme Court upheld the decision of the Court of Appeal that there was no such term. They laid down several principles in this regard:

i) A term would be implied into a detailed commercial contract only if that were necessary to give the contract business efficacy or so obvious that it went without saying.

ii) The implication of a term was not critically dependent on proof of an actual intention of the parties when negotiating the contract, but was concerned with what notional reasonable people, in the position of the parties at the time at which they had been contracting, would have agreed.

iii) It was a necessary but not sufficient condition for implying a term that it appeared fair or that the court considered that the parties would have agreed it if it had been suggested to them.

20.6 Given all this, a term will certainly not be implied if it would be contrary to business sense.

Irvine v. The General Medical Council **[2017] EWHC 2038 (Admin)**

Roderick Irvine, a consultant obstetrician unsuccessfully appealed against a finding by the GMC's Medical Practitioners Tribunal Service Panel that his fitness to practice was impaired by reason of dishonesty. One issue was whether he was properly insured to practice. The panel found that he had acted dishonestly in practising for five years without the required cover from either the Medical Defence Union or the Medical Protection Society and failing to disclosing his lack of cover to the hospitals at which he practised.

He claimed that he was perpetually insured because he had applied for insurance and signed a direct debit mandate. In considering whether any contract had been formed between the consultant and either the MPS or the MDU providing him with cover for the relevant period, it was necessary to focus on the parties' intentions as to the risk to be covered, the extent and duration of the cover, and the amount and manner of payment of the premium. The MDU could not have intended that a binding contract of insurance would be concluded when the consultant filled in an application form and signed a direct debit mandate in 2010. That would render the MDU liable to provide cover for anybody who applied, before it had assessed their application or fixed the level of the premium.

"I am also unable to accept Mr Stockinger's submission that a contact of insurance, once formed, would automatically renew, year after year, for so long as the direct debit remained in force. Again, I find it impossible to accept that the parties intended such a one-sided and impracticable arrangement. Such an arrangement would require the insurer to provide cover indefinitely, regardless of any change in the risk which it was insuring: the fact that the direct debit mandate remained in force would not in itself enable the insurer to review the premium on any basis other than a general increase in premiums to reflect inflation or increased costs. Indeed, as Mr Mant pointed out, the logical conclusion of the submission is that Mr Irvine — whose evidence was that he has never cancelled his direct debit — is still insured by MPS to this day.

"There is no basis here for suggesting that the professional organisations, having once accepted the risk of insuring a medical practitioner, were obliged to continue doing so indefinitely. It is in my judgment clear that the parties intended that the contract would last for no more than a year and would then be capable of being renewed if the professional organisation — having had the opportunity to make any enquiries it wished, and having decided what premium was appropriate — was willing to accept the risk. As a matter of law, each renewal was a new contract, limited in time to a period of one year. I appreciate of course that in the ordinary way, no great formality would attach to annual renewals, and the renewal of cover might seem to a medical practitioner to be a matter of course; but in law, there is in my judgment nothing "automatic" about it." per Holroyde J at para 77

21 TERMS IMPLIED BY THE COURTS 'IN LAW'

21.1 In a few cases, the courts have implied terms into contracts on the basis that certain types of contracts give rise to legal duties which, therefore, become terms of the contract. This is a matter of public policy rather than commercial necessity.

21.2 ***Liverpool City Council v. Irwin*** **[1977] AC 239 (HL)**

The tenants of a block of flats withheld the rent on the basis that the landlord (the council) was in breach of contract for not keeping the lifts and communal stairwells in a reasonable state of repair. There was no formal agreement that the landlord was responsible for this, but the House of Lords held that, as a matter of policy, there were implied terms to this effect. However, the Lords rejected Lord Denning's suggestion in the Court of Appeal that a term may be implied simply because it would be reasonable to do so.

21.3 ***Malik v. BCCI*** **[1997] 3 WLR 95 (HL)**

The plaintiff was employed by the BCCI which collapsed in 1991 amidst allegations of dishonesty and corruption. The plaintiff claimed damages for the adverse effect on his future employment prospects of his having once worked for such a disreputable company. On the preliminary issue of whether there was a cause of action, the House of Lords confirmed that there is an implied term in all employment contracts that the employer will not, without reasonable and proper cause, conduct itself in such a manner as to destroy or seriously damage the relationship of confidence and trust between employer and employee, unless this term has been expressly amended by the parties.

22 TERMS IMPLIED UNDER STATUTE

22.1 Three of the most important examples of parliamentary intervention into contract law are the Sale of Goods Act 1979 (as amended); the Supply of Goods and Services Act 1982 (as amended); and the Consumer Rights Act 2015.

22.2 The first two Acts covered consumer contracts until 1 October 2015, when the relevant provisions were largely re-enacted instead in the Consumer Rights Act 2015.

22.3 The most important terms implied into contracts for the sale of goods by these Acts are as follows:

- that the seller has the right to sell the goods. (SOGA 1979, section 12/ CRA 2015, section 17);
- that the goods match their description (SOGA 1979, section 13/ CRA 2015, section 11);
- that the good are of satisfactory quality in that they are fit for their usual purpose (including being reasonably durable) (SOGA 1979, section 14(2)/ CRA 2015, section 9);
- that the goods are fit for a particular purpose made known to the seller before the contract was made. (SOGA 1979, section 14(3)/ CRA 2015, section 10).

V INCORPORATION OF TERMS

23 INTRODUCTION

23.1 Express terms will not be incorporated into a contract unless both parties have "notice" of them at the time the contract is made. This applies to any express term, but it has particularly been an issue in relation to exemption clauses.

23.2 Having "notice" in this context does not necessarily mean having actual notice as notice may be deemed to have been given even to parties who have not read (or could not read) the contract.

24 SIGNING A DOCUMENT

24.1 If you sign a contractual document, you are presumed to have read and understood it, unless it has been misrepresented to you.

24.2 ***L'Estrange v. F Graucob Ltd*** **[1934] 2 KB 394 (CA)**

The plaintiff bought a cigarette vending machine and sued the suppliers when it did not work. The suppliers pointed out that there was an exclusion clause in the contract she had signed. She contended that it was in small print and she had not read it.

Held: She was bound anyway. If a term is contained in a signed document, the party signing it will be presumed to have read it, even if he cannot read, provided that the signatory has not been induced to sign by a fraud or misrepresentation.

"When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not… In this case the plaintiff has signed a document headed 'Sales Agreement', which she admits had to do with an intended purchase, and which contained a clause excluding all conditions and warranties. That being so, the plaintiff, having put her signature to the document and not having been induced to do so by any fraud or misrepresentation, cannot be heard to say that she is not bound by the terms of the document because she has not read them." per Scrutton LJ at p 404

24.3 ***Amiri Flight Authority v. BAE Systems plc*** **[2004] 1 All ER (Comm) 385 (CA)**

"Normally, in the absence of any misrepresentation, the signature on a contractual document must operate as an incorporation and acceptance of all its terms." per Mance LJ at para 16

24.4 ***Peekay v. Australia and New Zealand Banking Group*** **[2006] 2 Lloyd's Reports 511 (CA)**

"It was accepted that a person who signs a document knowing that it is intended to have legal effect is generally bound by its terms, whether he has actually read them or not. The classic example of this is to be found in L'Estrange v Graucob [1934] 2 KB 394. It is an important principle of English law which underpins the whole of commercial life; any erosion of it would have serious repercussions far beyond the business community." per Moore-Bick LJ at para 43

24.5 There is some debate about whether signing a document unread also fixes you with notice of unusual or onerous terms. This is discussed below.

25 CONSTRUCTIVE NOTICE

25.1 If the clause is contained on a ticket or sign etcetera, then the party may be presumed to have notice of it, even if he has not read it, if the document is of the type where such terms are common. The test is not whether he actually read the clause, but whether reasonable steps were taken to bring it to his notice.

25.2 ***Parker v. South Eastern Railway Co*** **(1877) 2 CPD 416**

The plaintiff's bag was stolen from the defendant's cloakroom. When he had deposited his bag, he had received a ticket on the back of which was printed that the company would not be responsible for any package worth more than £10. A similar notice was displayed in the cloakroom. The plaintiff's bag was worth more than £10, and he argued that he had not read the ticket, thinking it was a mere receipt, and had not seen the notice on the wall. The Court of Appeal said that the proper question in this case was not whether the plaintiff had actually read the conditions, but whether the defendants had taken reasonable steps to bring them to his notice. Whether giving somebody a printed ticket is sufficient notice of the terms it contains would depend on the kind of transaction being carried out (i.e. whether it was one to which a reasonable man would expect conditions to be attached).

"The railway company, as it seems to me, must be entitled to make some assumptions respecting the person who deposits luggage with them: I think that they are entitled to assume that he can read, and that he understands the English language, and that he pays such attention to what he is about as may be reasonably expected from a person in such a transaction… I think that a particular plaintiff ought not to be in a better position than other persons on account of his exceptional ignorance or stupidity or carelessness." per Mellish LJ

25.3 Thus, as long as the claimant knows – or ought to know – that there is writing on the ticket, he may be bound by what it says even if he has not read it.

25.4 ***Thompson v. London, Midland & Scottish Railway*** **[1930] 1 KB 41**

The plaintiff asked her niece to buy a railway ticket for her. The ticket, which cost 2s 7d had written on it that it was subject to the conditions set out in the company's timetable. This timetable cost nearly a fifth of the price of the fare, and on page 552 was an exemption clause. It was held that even though the plaintiff was illiterate and was unlikely to have read the exemption clause anyway, she was still bound by it!

25.5 Conversely, where the document is not of the type where one would normally expect to find terms written, the recipient will not be bound by the terms unless he has actually read them.

25.6 ***Chapelton v. Barry UDC*** **[1940] 1 KB 532 (CA)**

The plaintiff hired a deckchair for 2d from the defendants. He was given a ticket which he did not read, and was injured when the deckchair collapsed. The defendants tried to rely on an exclusion clause on the back of the ticket, but it was held that the ticket was merely a receipt and it was not reasonable to expect it to contain any contractual terms.

25.7 An application of the rules may be found in *O'Brien v. MGN Ltd* [2001] which suggests that the courts have a rather generous view of what "reasonably available" means.

O'Brien v. MGN Ltd **[2001] EWCA Civ 1279 (CA)**

The Daily Mirror launched a scratch card game. The rules were printed in *The Daily Mirror* on 29 April 1995 and on various other sporadic dates. Rule 5 stated that if more prizes were claimed than were available, a draw would take place for the prizes. On 25 June 1995, O'Brien bought *The People*, which incorporated a scratch card to be used with *The Daily Mirror* on 3 July 1995. There was a reference to "normal Mirror Group rules" applying, but the rules were not themselves printed. The claimant's scratch card revealed that he had won £50,000. Due to a printing error, there were 1472 other winners. A draw was made pursuant to rule 5 for one prize of £50,000, with a further £50,000 shared between all the "winners". O'Brien got £33.97.

He claimed that the rules about sharing the prize were not in his contract as he did not have proper notice of them. Held: The rules were incorporated into the contract. The offer (as contained in the newspaper) clearly incorporated the term "Normal Mirror Group rules apply". The words were there to be read and it made no difference whether or not the claimant had actually read or paid attention to them. The rules were not onerous or outlandish, and did not require "special notice". It was enough that the claimant could have discovered the content of the rules had he attempted to do so.

25.8 Rob Waugh for *The Metro* reported the following experiment on 30 September 2014 which reveals how little attention people pay to what they are signing.

"A security firm set up a fake free hotspot to test what people would agree to for a few minutes of free data – and several victims in London's Canary Wharf agreed to a contract with a clause which said they agreed to 'render up their eldest child for the duration of eternity'.

The contract is not legally binding, F-Secure assures us, and they have no intention of actually taking, or selling on, any children.

Around a fifth of visitors agreed to the 'Herod clause', the firm says – saying that the experiment shows an 'utter disregard' for security. As well as allowing internet security firms to take your children as slaves, connecting to open Wifi networks can pose serious security risks. Connecting to open hotspots can allow criminals to read emails sent to and from a device, and even steal passwords for services such as email and networks such as Facebook.

The firm's security advisor, Sean Sullivan, said: 'Free, open Wifi is insecure. It wasn't designed for the 21st century and it's leaking information about us to people that we don't have any knowledge of and they're collecting data on us that we're not consenting to.

At best, your device is only leaking information about you – at worst, your passwords are being spilled into a publicly accessible space, and it's not just spilling details to those that control the network – anybody on the network can see your information'."

26 LATE NOTICE

26.1 A clause has no effect if notice of it is not given until after the contract is made.

26.2 ***Olley v. Marlborough Court Ltd*** **[1949] 1 KB 532**

A guest booked in at the reception desk of an hotel. She then went to the bedroom, where there was a notice on the wall saying that the hotel accepted no responsibility for lost or stolen items. Her furs were stolen. It was held that the hotel could not rely on the exemption clause, as the guest had already made her contract before she had the chance to see the notice.

26.3 ***Thornton v. Shoe Lane Parking Ltd*** **[1971] 2 QB 163 (CA)**

The plaintiff had got a ticket from an automatic machine as he entered a car-park. On the ticket it said that the contract was subject to conditions displayed on the premises. A notice in a car-park purported to exclude liability for personal injury. The plaintiff was injured. Held: The contract was made when the plaintiff entered the car-park, so the notice on the ticket came too late. In any case, a term that important should have been given special prominence.

The concept of late-notice causes problems where tickets are concerned. Technically, any terms contained on a ticket will be given late notice since tickets are never issued until after a contract has been made. However, the courts have adopted a pragmatic view that where a ticket is of the type where a reasonable person would expect there to be terms, then the buyer is put on notice – at least of usual terms – simply by entering the contract at all, even though the ticket may not be issued until after payment.

By the same token, if you *should* expect to find extra documented terms in your contract, you are under a duty reasonably to find them out. This will be especially true in a commercial context.

26.4 ***Stretford v. The Football Association*** **[2006] EWHC 479**

Paul Stretford is a football players' agent, whose clients include Wayne Rooney. In order to act as a player's agent, one must obtain a licence from FIFA (the Fédération Internationale de Football Associations). The terms of this licence require the agent to observe the regulations of FIFA and the national football associations at all times. Stretford obtained his licence in 1995.In December 2001, FIFA promulgated a new version of the agents' regulations to come into force in March 2001. Stretford heard about these regulations and successfully applied for a new licence in 2002. On the face of the licence were the words:

"The holder of this licence agrees to abide by the rules and regulations of FIFA, the Football association, the FA Premier League and the Football League."

In 2005, Stretford was accused by the FA of breaching the Rules of the Football Association in the way he had acquired the rights to represent Wayne Rooney. These rules were originally drafted in 1903, but have undergone various amendments since. The FA convened a disciplinary hearing under Rule K (which deals with arbitration). Rule K had been amended in 2000, and Stretford argued that it did not apply to him either because he had late notice of it; or because it was unduly onerous, and so required special notice.

The late notice claim was based on the contention that he had not been given a copy of the amended FA Rules to read before obtaining his licence in 2002, and that the reference to them on the licence itself came too late to bind him. Given that he had been a professional agent since 1995, the court was not impressed.

"As a players' agent it was his duty to keep himself informed of the Rules. Rule K applies as much to disputes between a player and his club as between a players' agent and the FA. Moreover there was nothing secret about Rule K. It was published as one of the Rules in the annual FA Handbook, in particular that for the Season 2001-2002, where it featured in the index under the heading of 'arbitration procedures'. Plainly Mr Stretford would need to have a copy of the annual handbook as part of the tools of his trade and he himself exhibited parts of the edition for the 2004-2005 season, including Rule K, as part of exhibit 'PS 1' to his witness statement made on 16 September 2005 in which he described it as an annual publication.

Nevertheless there has been no cross-examination of either Mr Stretford or Mr Diaz-Rainey. Thus it is not open to me to find affirmatively that Mr Stretford at all relevant times knew of the existence and terms of Rule K. Nevertheless I am entitled to conclude, and do, that at all material times Mr Stretford was in possession of documentary material which included Rule K (or its earlier versions) and that, if he did not know of its terms, he could and should have done."

per The Chancellor of the High Court, paras 15-17

27 NOTICE BY TRADE CUSTOM OR COURSE OF DEALING

27.1 A clause may be included if there has been a consistent course of dealing between the parties with similar clauses incorporated, or there is a trade custom.

27.2 ***Spurling (J) Ltd v. Bradshaw*** **[1956] 1 WLR 461 (CA)**

Bradshaw bought eight barrels of orange juice which he sent to Spurling to be stored in their warehouse. S later sent B a "landing account" which included many lines of small print stating the "contract conditions", amongst which was an exemption clause in the following terms:

"We will not in any circumstances when acting either as warehousemen or in any other capacity, be liable for any loss, damage or detention howsoever, whensoever, or wheresoever occasioned in respect of any goods entrusted to or carried or handled by us in the course of our business, even when such loss, damage or detention may have been occasioned by the negligence, wrongful act or default of ourselves or our servants or agents."

When B came to collect his barrels, two were leaking, one contained dirty water and the other five were empty! B refused to pay and S sued. B counterclaimed for the value of the damaged goods, and S relied on the exemption clause.

B argued that the clause had not been incorporated into the contract as the "landing account" which contained the conditions was not sent until after the contract was concluded. The Court of Appeal held that it was incorporated as there had been many previous dealings on the same conditions.

"It was said that the landing account and invoice were issued after the goods had been received and could not, therefore, be part of the contract of bailment: but the defendant admitted that he had received many landing accounts before. True he had not troubled to read them. On receiving this account, he took no objection to it, left the goods there, and went on paying the warehouse rent for months afterwards. It seems to me that by the course of business and conduct of the parties, these conditions were part of the contract." per Denning LJ at p 125

27.3 ***Hardwick Game Farm v. Suffolk Agricultural etc Association*** **[1969] 2 AC 31 (HL)**

It was held that where there has been a consistent course of dealing between the parties on certain terms, such terms may be incorporated even though notice has not been given in the particular case. In this case, three contracts a month for three years was held to be sufficient "course of dealing", whilst in *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71, four transactions in five years was held not to be sufficient.

27.4 ***British Crane Hire Corp Ltd v. Ipswich Plant Hire Ltd*** **[1975] QB 303 (CA)**

The defendants hired a crane from the plaintiffs. Both were in the business of hiring out such machinery, and it was a usual condition of such hire contracts that the party taking the machinery would indemnify the party hiring it out against expenses incurred in the use of it. Before the defendants could sign the hire form containing this term, the crane sank. It was held that the defendants were liable even though they had not signed the form. As they were in the trade themselves, they should have known what the usual conditions of hire would be.

"It is clear that both parties knew quite well that conditions were habitually imposed by the supplier of these machines: and both parties knew the substance of those conditions… In these circumstances, I think the conditions on the form should be regarded as incorporated into the contract. I would not put it so much on the course of dealing, but rather on the common understanding which is to be derived from the conduct of the parties, namely, that the hiring was to be on the terms of the plaintiff's usual conditions." per Lord Denning MR at p 311

27.5 It would be unusual for a term to be incorporated by trade custom in a consumer contract.

McCutcheon v. David MacBrayne Ltd **[1964] 1 All ER 430 (HL)**

Mr McSporran, a farmer in Islay, arranged with DM Ltd for his brother-in-law's car to be shipped to the mainland. DM quoted the freight for the return journey and McSporran paid the money. He was given a receipt and delivered the car to the shippers. It was shipped on the "Lochiel", but it never arrived as the ship sank *en route* due to negligent navigation. The shippers relied on an exemption clause on the freight invoice, but this was held not to be part of the contract as it had been given to McSporran only after the oral agreement had been concluded. The company had intended for McSporran to sign a risk note which incorporated the exemption clause, but forgot to do so on this occasion. However, McSporran had used the company before, and so had sometimes signed such notes in the past, although he had never read them. The company argued that the exemption clause was imported into the contract by reason of the previous dealings. It was held that in these circumstances notice of the term could not be implied by the previous dealings.

"If it could be said that when making the contract Mr McSporran knew that the pursuer was simply forgetting to put it before him for signature, then it might be said that neither he nor his principal could take advantage of the error of the other party of which he was aware. But counsel frankly admitted that he could not put his case as high as that. The only other ground on which it would seem possible to import these conditions is that based on a course of dealing. If two parties have made a series of similar contracts each containing certain conditions, and then they make another without expressly referring to those conditions it may be that those conditions ought to be implied… But again, the facts here will not support that ground. According to Mr McSporran, there had been no consistent course of dealing; sometimes he was asked to sign and sometimes not. And, moreover, he did not know what the conditions were. This time he was offered an oral contract without any reference to conditions, and he accepted the offer in good faith." per Lord Reid at p 432

27.6 A term will not be incorporated by course of dealing unless a reasonable business person would conclude that it had definitely been incorporated: it is not enough that it was objectively a mere possibility.

***Hamad M Aldrees and Partners v. Rote X Europe Ltd*. [2019] EWHC 574 (TCC)**

A Saudi Arabian company claimed for damages allegedly caused by the defendant UK company's breach of the parties' contract. The claimant specialised in extracting, sorting and trading in silica sand. The defendant manufactured and supplied machines for sorting raw materials such as sand. Mesh grilles in the machines enabled sand to be sorted into different particle sizes according to the client's needs. The claimant wished to purchase some machines, and after negotiations with the defendant it decided to order four machines based on the defendant's revised quotation. The quotation stated that the machines would be capable of meeting the claimant's needs in terms of throughput, being the amount of material the machines could handle per hour.

It also directed the claimant to "see attached general terms and conditions of sale" but none were attached, although they were attached to one of the defendant's earlier quotations.

After the machines were delivered, it transpired that the mesh grilles were the wrong size. This led the claimants to a loss in the sum of £40 million.

The defendant argued *inter alia* that it was protected from the claim by an exclusion clause in its terms and conditions of sale.

HELD: For the defendant to rely on the exclusion clause in its terms and conditions there had to be some form of words, or perhaps some conduct, that incorporated those conditions into the contract, whether by reference or directly. The contract was concluded when the defendant proceeded to manufacture and supply the machines without protest following receipt of the claimant's purchase order. That purchase order was made by reference to the defendant's revised quotation which, notwithstanding the words "see attached general terms and conditions of sale", had attached no terms and conditions.

Further, the defendant had been inconsistent in its approach to incorporation during the negotiations. On balance, it could not be said that a reasonable businessperson would assume that the revised quotation was referring to the terms and conditions attached to the previous quotation. They might conclude that those terms and conditions were possibly incorporated, but not definitely, which did not suffice. Accordingly, the exclusion clause, which would otherwise have protected the defendant from the claimant's claim, had not been incorporated and the defendant could not rely on it.

Sir Antony Edwards-Stuart discussed the authorities on this matter.

167. In Transformers & Rectifiers v Needs [2015] EWHC 269 (TCC) I reviewed some of the relevant authorities on the incorporation of terms, at paragraphs 14-31. I said this:

"14. In Hardwick Game Farm v SSAPA [1969] 2 AC 31 there was a series of oral contracts between SSAPA and its supplier, Grimsdale, for meal to be fed to game birds. Each contract was followed by a Contract (or Sold) Note sent by the sellers which contained on the back what were described as "Conditions of Sale". The buyer's agent knew that there were conditions on the back of the Contract Notes but had never read them.

15. There had been many previous dealings between the parties of a similar character. In each case the contract was followed by the dispatch of the Contract Note with the same standard terms on the reverse. In both the House of Lords and the Court of Appeal it was held that the conduct of SSAPA in accepting these Contract Notes without making any comment, query or objection about the Conditions of Sale was conduct which would lead Grimsdale, the seller, reasonably to believe that SSAPA intended to enter into the contracts on those terms. However, it is important to note that the transactions followed a consistent pattern with documentation in precisely the same form on each occasion.

16. In Circle Freight International Ltd v Medeast Gulf Exports Ltd [1988] 2 Lloyd's Rep 427 , the course of dealing consisted of eleven contracts in the previous six months. On each occasion the contract had been made orally by telephone but the invoice for the carriage charges sent at a later date stated that all business was transacted by the carrier under the current conditions of the Institute of Freight Forwarders, a copy of which was available on request. A copy was never requested. The consignor's managing director accepted that he knew that carriers by road often dealt on standard terms which addressed questions of risk of loss or damage, but said that he had not noticed the reference to the IFF conditions in the invoices sent after each of the contracts had been concluded. The Court of Appeal held that the IFF conditions were incorporated into the contract.

17. At page 433, Taylor LJ noted that the consignor's managing director knew that some terms applied and that forwarding agents might impose terms which would frequently deal with risk, but never asked for a copy of the terms. In addition, he said that the terms were not particularly onerous or unusual. Taylor LJ then said this: "…I consider that reasonable notice of the terms was given by the plaintiffs. Putting it another way, I consider that the defendant's conduct in continuing the course of business after at least 11 notices of the terms and omitting to request a sight of them would have led and did lead the plaintiffs reasonably to believe the defendants accepted their terms. In those circumstances it is irrelevant that in fact [the managing director] did not read the notices."

18. Bingham LJ (as he then was) said, at page 435, that the only possible answer to the question "Has reasonable notice of the terms been given?" was that it had.

19. Again, this appears to have been a case where the course of dealing consisted of a number of transactions carried out in precisely the same way.

20. The facts of Balmoral Group v Borealis (UK) [2006] EWHC 1900 (Comm) were a little more complicated. Between 1994 and mid-2002 Balmoral made nearly 400 purchases of polyethylene from one or more companies in the Borealis group. By a fax dated 18 January 1995 Borealis made it plain that its prices were quoted "… subject to normal terms and to current conditions of sale", and these terms were put on the back, or as one of the pages, of the invoices submitted by Borealis to Balmoral. These invoices were seen and initialled by Balmoral's managing director: he realised that there were terms on the back of the invoices but he did not study them.

21. From December 1995 Balmoral's purchase orders referred to Balmoral's terms, albeit in rather poor typescript at the bottom of the purchase orders, but these were never otherwise referred to or provided to Borealis. Christopher Clarke J (as he then was) found that there were no customary terms in the polymer trade in the UK in the sense of terms which are so "… certain, notorious and reasonable …" that anyone purchasing polymer must be taken to have contracted on those terms, unless expressly excluded or otherwise agreed. But he did find that suppliers of polymer in the UK habitually seek to sell on their standard terms and conditions.

22. The procedure was that when an order was received someone at Borealis, after checking that the price on the order was the same as that on the price list, would check with the supplying plant that delivery could be made. If it could, someone at Borealis would confirm the order (probably by telephone) to someone at Balmoral. Delivery would then take place and, a couple of days thereafter, an invoice would be sent to Balmoral with Borealis's terms on the back.

23. Having considered the Circle Freight and Hardwick Game Farm cases, together with other authorities, Christopher Clarke J said, at [348]: "Whether or not one party's standard terms are incorporated depends on whether that which each party says and does is such as to lead a reasonable person in their position to believe that those terms were to govern their legal relations. The Court has to determine what each party was reasonably entitled to conclude from the acts and words of the other …The question is one of fact to which prior authority may form an uncertain guide."

24. Christopher Clarke J concluded that, since Balmoral had purchased material at the quoted prices and had paid the invoices submitted by Borealis with the knowledge of Borealis's conditions and without ever suggesting that they were not applicable, Borealis was reasonably entitled to assume that Balmoral accepted that its conditions applied."

28 SPECIAL NOTICE

28.1 If the clause is particularly unusual and/or severe, special notice may need to be given. This means that the term in question should be specifically pointed out to the other party before the contract is made.

28.2 ***Spurling (J) Ltd v. Bradshaw*** **[1956] 1 WLR 461 (CA)** (see above at 27.2)

Denning LJ made the following *obiter* comment: *"Some clauses I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient."* per Denning LJ at p 125

It may seem odd that the Court of Appeal did not consider the clause at issue in the case to be particularly unusual and/or severe, though this probably relates to the fact that it really concerned commercial insurance risks, and the courts are unwilling to interfere with arm's length commercial arrangements.

28.3 The *obiter* in Spurling (J) *Ltd v. Bradshaw* [1956] was famously applied by the Court of Appeal in *Interfoto Picture Library v. Stiletto Visual Programmes* [1989] which itself has been cited in several later cases.

28.4 ***Interfoto Picture Library v. Stiletto Visual Programmes*** **[1989] QB 433 (CA)**

The plaintiffs sent the defendants some transparencies. On the delivery note was a term which stated that if the transparencies were not returned on the due date, there would be a fee of £5 per transparency per day for each day they were late. They were returned two weeks late and the defendants were charged £3,783.50. It was held that they had not been sufficiently notified of the term and so were not liable.

"At the time of the ticket cases in the last century it was notorious that people hardly ever troubled to read printed conditions on a ticket or delivery note or similar document. That remains the case now. In the intervening years the printed conditions have tended to become more and more complicated and more and more one-sided in favour of the party who is imposing them, but the other parties, if they notice that there are printed conditions at all, generally still tend to assume that such conditions are only concerned with ancillary matters of form and are not of importance. In the ticket cases the courts held that the common law required that reasonable steps be taken to draw the other parties' attention to the printed conditions or they would not be part of the contract. It is in my judgment a logical development of the common law into modern conditions that it should be held, as it was in Thornton v Shoe Lane Parking Ltd. [1971] 2 QB 163 , that, if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party…

"The defendants are not to be relieved of that liability because they did not read the condition, although doubtless they did not; but in my judgment they are to be relieved because the plaintiffs did not do what was necessary to draw this unreasonable and extortionate clause fairly to their attention."
per Dillon LJ

28.5 ***Jonathan Wren & Co Ltd v. Microdec plc*** **[1999] 65 Con LR 157**

The claimant ran a recruitment business in the banking and finance sector. It purchased a specialist software package from the defendant and suffered severe losses when the software proved to be defective. The defendant tried to rely on an exemption clause in a document they had produced entitled: "Conditions of Contract for the Supply, Installation and Support of Computer Systems". The term read as follows:

"Microdec's liabilities shall be limited to death or direct physical injury caused by the negligence of Microdec or its employees and Microdec shall not be liable for any other direct or indirect loss or loss of profits howsoever caused and of whatsoever nature save any losses which cannot lawfully be excluded."

Held: The document was ineffective anyway as it did not have the requisite signatures, but applying the decision in Interfoto, the court held *obiter* that so stringent a clause in an unsigned document would have needed special attention drawn to it for it to be effective.

28.6 ***Ocean Chemical Transport Inc v. Exnor Craggs Ltd*** **[2000] 1 All ER (Comm) 519 (CA)**

The court held *obiter* that the following term in a contract for the sale of bunkers did require special notice: "All liability whatsoever on the seller's part shall cease unless suit is brought within six months after the delivery of the goods or the date when the goods should have been delivered."

28.7 However, the courts are willing to recognise when a decent effort has been made by the defendant.

28.8 ***Amiri Flight Authority v. BAE Systems plc*** **[2004] 1 All ER (Comm) 385 (CA)**

Amiri bought an aircraft and technical back-up package from BAE for US$25,450,000. The complex contract contained a severe exemption clause to protect BAE from liability for any faults developing with the aircraft. To ensure that notice was taken of this, BAE had the clause printed in block capitals and gave the draft contract to Amiri to consider overnight before they signed it. Amiri claimed, *inter alia*, that they had not been given proper notice of this extreme clause and that it was, therefore, not incorporated.

It was held that whatever else might have been wrong with the clause, there was no problem with its incorporation by reasonable notice.

28.9 ***Stretford v. The Football Association*** **[2006] EWHC 479** (see above at 26.4)

Stretford also argued that the Rule K arbitration clause was unduly onerous and required special notice. He claimed it was onerous because under the rule, the arbitration would be heard in private; the award of the arbitrators would not be published unless all parties agreed; and recourse to the courts was excluded. The court did not agree that this was unduly onerous.

"At this stage I should also consider whether the terms of Rule K are 'particularly onerous or unusual'. These words are not terms of art but describe the sort of term which, because of its nature or content, requires the party who relies on it, the FA, to demonstrate that it was brought fairly and reasonably to the attention of Mr Stretford if that term is to be binding on him. Moreover the question must be considered at the time the contract into which it is said to have been incorporated was made, namely at the time the players' agents licence was issued by the FA to Mr Stretford in 2002.

"It is unnecessary to set out the terms of Rule K. It is a conventional arbitration agreement applicable between the persons or bodies described in the definition of 'Participant', namely: 'an affiliated association, competition, club, club official, player, official, match official and all such persons who are from time to time participating in any activity sanctioned either directly or indirectly by the [FA]'. For the purposes of Rule K, the term 'Participant' includes the FA.

"The respects in which it is claimed to be onerous or unusual are those to which I have referred in paragraph 14 above. A private hearing and a confidential award are far from being either onerous or unusual in the context of an arbitration agreement. Indeed, it is the element of privacy which makes the arbitral system so attractive to so many. Rule K5(b) provides that: 'The parties shall be deemed to have waived irrevocably any right to appeal, review or recourse to a court of law.'

"Rule K is equally applicable to all parties. Thus it is unlike an exemption clause in favour of one party. It is effective, pro tanto, to waive rights under Article 6 ECHR. Such a waiver has long been regarded as acceptable for the purposes of the ECHR in the case of a voluntary arbitration, cf Deweer v Belgium (1980) 2 EHRR 439, 460, para 49 and Bramelid v Sweden (1982) 29 DR 64. Further, the terms of the Arbitration Act 1996 sis 9, 68 and 69 clearly demonstrate the intention of parliament that such clauses should be given effect.

Special notice and signed documents

28.10 There appear to be contrasting views on whether a person who signs a document will be taken to have read and understood even the unusual or onerous terms. A useful summary of the authorities was given by the judge in the following case.

Do-Buy 925 Ltd v. National Westminster **[2010] EWHC 2862 (QB)**

"It remains an undecided question whether the Interfoto principle can ever apply to a signed contract. In that case, the defendant was held not to be bound by a term in a printed set of conditions which had been provided to him in the form of a delivery note, but which he had neither signed nor read.

In Ocean Chemical Transport v Exnor Crags Ltd [2000] 1 Lloyd's 466, Evans LJ, with whom Henry and Waller LJ agreed, was prepared to assume that the principle might apply to onerous and unusual clauses in a signed contract 'in an extreme case where a signature was obtained under pressure of time or other circumstances'.

"In HIH v New Hampshire [2001] 2 Lloyd's 161, Rix LJ doubted whether the principle was properly applicable outside the context of incorporation by notice (see paragraph 209).

"In Amiri Flight Authority v BAE Systems plc [2004] 1 All ER 385, 392, Mance LJ, with whom Rix and Potter LJ agreed, noted the doubts of Rix LJ in HIH v New Hampshire and stated that it was unnecessary to decide whether the principle could ever apply to signed contracts. He envisaged that it might do so where, for example, a car owner was asked to sign a ticket on entering a car park or a holiday maker asked to sign a long small print document when hiring a car which in either case proved to have a provision of 'an extraneous or wholly unusual nature'; but that such cases might be ones where the application of the provision was precluded by an implied representation as to the nature of the document. He reiterated the normal rule that in the absence of any misrepresentation, the signature of a contractual document must operate as an incorporation and acceptance of all its terms."
per Andrew Popplewell QC at para 91

28.11 This *obiter* was cited with approval by Behrens J in the case of:

One World (GB) Ltd v. Elite Mobile Ltd **[2012] EWHC 3706 (QB)**

Elite Mobile Ltd is a very large company which is in the business of supplying mobile phone SIM cards to distributors. It makes a loss on the sale of the cards themselves but gains large profits from commissions paid by the network providers for each customer who connects with them.

One World is a very small company – just one man called Mr Mughal – which distributes the cards to retailers. Under his signed contract with EM, he would be paid a bonus for each customer who connected with a network, but only if at least 40% of customers did so. As not enough customers connected, EM refused to pay Mughal/OW any connection bonus at all.

Mughal claimed, *inter alia*, that he should not be bound by the 40% threshold requirement as he had not read the threshold term in the contract he signed; that his English was very poor; and that the term was unusual or onerous.

The court held that – in the context of this business – the term was neither unusual nor onerous, and that his signature on the contract confirmed the incorporation of the terms. However, the judge was prepared to concede *obiter* that the special notice doctrine might sometimes apply even to signed contracts (see para 58 of the case).

28.12 ***Kaye v. Nu Skin UK Ltd*** **[2012] EWHC 958 (QB)**

It is notable that in this earlier case in 2012, the High Court had also dealt with the question of special notice in the context of a signed contract, without giving any opinion about whether or not the signature affected the application of the doctrine.

In the event, the court decided that the term (about where an arbitration should take place) was not unduly onerous so the question did not arise, but the judge in *One World (GB) Ltd v. Elite Mobile Ltd* did not allude to this case at all, despite it being in the same court in the same year.

29 MISREPRESENTATION OF TERMS

29.1 If the party relying on the exemption clause has misrepresented its effect, he cannot rely on it.

29.2 ***Curtis v. Chemical Cleaning and Dyeing Co*** **[1951] 1 KB 805 (CA)**

The plaintiff took to the defendants' shop a white satin wedding dress to have it cleaned. The dress was trimmed with beads and sequins. The shop assistant gave her a form to sign and the plaintiff asked what it was all about. The assistant replied that it exempted the company from the risk of damage to the beads and sequins only, so the plaintiff signed. In fact, the form said the company was not liable for *any damage at all.* When the dress was returned, it was stained, and the defendants tried to rely on the exemption clause.

Held: They could not rely on the exemption clause as they had misrepresented its effect.

VI EXEMPTION CLAUSES AT COMMON LAW

30 INTRODUCTION

30.1 It is common in business contracts to include express terms which attempt to limit or exclude the liability of one or other of the parties (such terms are known as "limitation" and "exclusion" clauses respectively). A similar ruse is to include a "variation" clause in a contract which gives one of the parties the right to change the terms.

30.2 These devices are sometimes thought to be unfair, particularly in consumer contracts where the parties are not of equal bargaining strength. The courts have, therefore, attempted to interpret such clauses in favour of the victims of the breach of contract against whom the exemption or variation clause would otherwise operate. The matter is now largely dealt with by the Unfair Contract Terms Act 1977 and the Consumer Rights Act 2015.

30.3 There are four matters to consider in deciding whether an exemption clause is valid:

1. Has the term been properly incorporated into the contract?
2. Does the clause cover the breach complained of?
3. The effect of the Unfair Contract Terms Act 1977
4. The effect of the Consumer Rights Act 2015

31 INCORPORATION

31.1 This has already been discussed in Chapter 6 above.

32 COVERING THE BREACH
The *Contra Proferentem* Rule

32.1 Assuming that the exemption clause has actually been incorporated into the contract at all, the person relying on it must show that the breach complained of is expressly and exactly covered by the exemption clause. If the clause is at all ambiguous, it will be construed AGAINST the interests of the person relying on it. This is known as the *contra proferentem* rule.

32.2 ***Tam Wing Chuen v. Bank of Credit and Commerce Hong Kong Limited*** **[1996] 2 BCLC 69**

"The basis of the contra proferentem principle is that the person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests, so that if words leave room for doubt about whether he is intended to have a particular benefit there is reason to suppose that he is not." per Lord Mustill at p77

32.3 Various cases illustrate the strict effect of the contra proferentem principle.

32.4 ***Houghton v. Trafalgar Insurance Co Ltd*** **[1954] 1 QB 247 (CA)**

A five-seater car was involved in an accident whilst carrying six people. The insurance policy excluded liability where the car was carrying an excess "load". It was held that passengers were not a "load" and so the exclusion clause did not apply.

32.5 ***Andrews Bros (Bournemouth) Ltd v. Singer and Co Ltd*** **[1934] 1 KB 17 (CA)**

A clause in a dealership agreement provided that "all conditions, warranties and liabilities implied by statute, common law or otherwise are excluded".

Held: This was not effective to protect the defendants from breach of an express term.

32.6 ***Hollier v. Rambler Motors (AMC) Ltd*** **[1972] 2 QB 71 (CA)**

A car left for repair was damaged in a fire caused by the garage owner's negligence. The garage owner tried to exclude his liability for the damage by relying on a term which read:

"The company is not responsible for damage caused by fire to customer's cars on the premises."

It was held that the term was not incorporated in the contract anyway, but even had it been, it would not have been effective, as it could be read as a simple warning that the garage owners were not generally iable (except for negligence) rather than as an actual exemption clause.

32.7 ***KG Bominflot Bunkergeselischaft Für Mineralöle mbh & Co KG v. Petroplus Marketing AG (The Mercini Lady)*** **[2009] EWHC 1088 (Comm)**

In a contract for the sale of gasoil, the sellers inserted clause 18 which read:

"There are no guarantees, warranties or representations, express or implied, of merchantability, fitness or suitability of the oil for any particular purpose or otherwise."

When the oil was delivered to the buyer it was not of merchantable quality, and the buyer claimed a breach of the implied conditions in the Sale of Goods Act 1979, section 14(2) and 14(3). The seller claimed that they had excluded any such liability by clause 18. The court held that as the term breached was a condition (by virtue of the Act) and as the exclusion clause did not mention the word "condition", it did not cover the breach in question.

32.8 ***Stocznia Gdanska SA v. Latvian Shipping Co*** **[1998] 1 WLR 574 (HL)**

S, a shipyard, was engaged by L for the design, construction, completion and delivery of several vessels. The contract contained a clause which set out the rights of S in the event of a rescission. S rescinded the contract when L did not pay for the services, and claimed the debt at common law. L contended that S had no right to sue at common law as they had excluded this right by setting out an alternative under the contract.

Held: In the absence of clear words to the contrary, a contracting party cannot be taken to have intended to deprive himself of any common law remedies for breach of contract. There were no such clear words here, and S were entitled to a common law remedy against L.

32.9 ***BHP Petroleum Ltd v. British Steel plc*** **[2000] 2 All ER (Comm) 133 (CA)**

BHP contracted with BS for the supply of a steel pipeline to enable gas to be reinjected into an offshore oil well. The conditions included a clause that: "neither supplier nor purchaser was to bear any liability for loss of production, loss of profits, loss of business or any other indirect losses or consequential damages".

The pipeline failed, and BHP claimed the cost of replacing the pipeline and substantial losses caused by inability to use it.

BS claimed*, inter alia*, that the exclusion clause relieved them from all liability. The court held that although the production and profit losses were covered by the clause, the cost of replacing the pipeline was not.

32.10 ***Bacardi-Martini Beverages Ltd v. Thomas Hardy Packaging Ltd*** **[2002] 2 All ER (Comm) 335 (CA)**

Terra manufactured carbon dioxide for use in carbonated drinks which they supplied to Messer who resold it to various customers. Due to a leak at Terra's chemical plant the carbon dioxide was contaminated with benzene. The contaminated carbon dioxide was used to make Bacardi Breezers, many bottles of which had consequently to be recalled from wholesalers and destroyed. Bacardi sued THP, who had packed the drinks; THP sued Messer, who sold the carbon dioxide; and Messer sued Terra, who had manufactured it. Bacardi was awarded £2,125,000 against THP, and so on down the line.

Messer appealed on the basis of a limitation clause in the contract which stated:

"The liability of Messer…in respect of direct physical damage to property (and losses, costs and expenses directly arising from such injury or damage) whether through negligence or otherwise, shall be limited to £500,000 in respect of any one incident."

Several issues arose from this:

First, was the contamination "one incident" or a collection of incidents? The trial judge held that despite there being several events leading to the contamination, it should be interpreted as "one incident". This point was not appealed.

Second, did the contamination amount to "damage to property"? The court held that it did not. There had never been a finished product which had been damaged. Rather, the breach had led to a defective product being created. Thus, the exemption clause did not apply.

"Although it might be possible to speak of the mix of Bacardi's concentrate and THP's own water as having been "damaged" by being admixed with benzene contaminated carbon dioxide, the more natural view is that the mix of concentrate and water ceased (as always intended) to exist and the finished product came into existence at the moment of such admixture. What resulted was not damaged concentrate and water, but a defective product." per Mance LJ at para 10

32.11 ***Elvanite Full Circle Ltd v. AMEC Earth & Environmental (UK) Ltd*** **[2013] EWHC 1191 (TCC)**

The claimant was a demolition and recycling contractor. Two months before buying a two acre plot of industrial land in Essex for £561,000, it instructed the defendant, a company which (amongst other things) advises about planning matters concerning waste management sites, to make a planning application seeking permission for waste recycling at the site.

The claimant sued the defendant, inter alia, for delaying and botching the application, which (it claimed) led to a costly delay in eventually obtaining the planning permission through another agency.

The defendant denied liability, but also claimed that the case had been brought out of time, as there was an express term in the contract which stated that: "All claims by the client shall be deemed relinquished unless filed within one year after substantial completion of the services." As the claimant had not commenced proceedings within a year of completion, the defendant claimed that it was now too late to do so.

However, Couldon J held that "filing" a claim was not the same as "commencing" a claim. Indeed, he observed that: "The 'filing of claims' is not a process recognised by English court procedure." (para 295).

"It is, of course, axiomatic that exclusion clauses of this type have to be construed strictly. They also have to be construed contra proferentem. On either approach, it seems to me that I have to give the claimant the benefit of any doubt arising from the words used by the defendant in their standard terms and conditions. In those circumstances, I am unable to construe this provision as requiring the claimant to issue proceedings within a year of the termination of the defendant's services."
per Coulson J at para 297

However, he agreed with the defendant that the clause at least required the claimant to have issued a properly particularised Letter of Claim within the time limit, and as that had not been done either, the claim was, indeed, out of time.

32.12 The *contra proferentem* rule applies to variation clauses as well as exemption clauses.

***Williams v. Travel Promotions Ltd (trading as Voyages Jules Verne)* [1998] The Times, 20 February 1998 (CA)**

The booking conditions in a travel brochure included the following clauses:

"The tours scheduled in this brochure are planned many months in advance and sometimes changes may be necessary. Travel Promotions Ltd reserve the right to make changes. Your rights depend on the type of change. Alterations are either 'significant' or 'minor'. Travel Promotions Ltd has the right to make 'minor' changes at any time.

Due to demand for flights, hotels and accommodation, over which even Travel promotions has no control, it is not always possible to guarantee particular departure domestic flights, the aircraft type and/or hotels featured on a particular departure date, or the precise itinerary. We, therefore, have to reserve the right to change any flight or hotel listed and, if necessary, even to modify the itinerary itself without prior notice.

No compensation is payable in such circumstances, nor does it confer the right of cancellation."

Williams booked a "Flight of Angels" tour to the Victoria Falls from 24 December to 4 January 1995, which involved flying into and out of Livingstone, Zambia, and crossing into Zimbabwe. He chose to stay at the Sprayview Hotel in Victoria Falls for the eight nights, but was told a few days before the departure date that he would have to transfer on 3 January to the Intercontinental Hotel in Livingstone, as it would be more convenient for the tour company to get him to the airport from there. This transfer caused Williams a great deal of inconvenience and he lost half a day of his holiday in making the move. He sued for £148 in damages, but the tour company relied on the conditions in their brochure.

The plaintiff contended that the conditions covered only "necessary" alterations, and the changes in question were not necessary for the defendants, but merely convenient. The Court of Appeal held, inter alia, that the word "necessary" must be strictly construed to cover only those changes which could not be avoided (because, for example, of over-booking), and did not include changes that were merely reasonably required or sensible. Thus, the tour company could not rely on their conditions to exclude liability in this case.

32.13 The *contra proferentem* rule was extensively discussed by Carwarth L.J. in…

***Lexi Holdings plc v. Stainforth* [2006] EWCA Civ 988**

Gareth Stainforth got a short-term loan from Lexi to buy a residential property. S had difficulty in refinancing the loan, and asked L if they knew of anyone who might be interested in purchasing the property. L introduced S to a property investor who was interested, and L&S entered an "exclusive sale agreement" under which S would be "relinquishing all rights" to the property to L, who would undertake to sell it for their own benefit. The expected sale did not go ahead, and L sought to rescind the agreement, served a demand for payment on S, and appointed a receiver. S claimed that the term of the agreement where he "relinquished all rights" to the property, must be taken to mean that he also was relieved of all liability for it. The court held that the ambiguity must be resolved in S's favour. As L had drafted the term in question, it must be interpreted in the way which would least favour them.

"To each of those contentions the other can fairly say that it is not what the agreement says. In such circumstances, the Court has to do the best it can on the basis of the intended purpose of the arrangement as understood by both parties, the practical consequences of the alternative contentions, and such other tools as the law makes available in such cases. One of those tools is the so-called 'contra proferentem' rule. Lewison, The Interpretation of Contracts (3rd ed) offers a literal translation of the full Latin version of the rule: 'The words of documents are to be taken strongly against the one who puts forward.' (para 7.07)

"He notes the ambiguity inherent in the last phrase. However, in the present context detailed discussion is unnecessary. Mr Lopian, while urging that use of this rule should be a matter of last resort, accepts that in this case, if all other points were equally balanced, it would operate against his client, as the person who put forward the document. It is sufficient to refer to Lord Mustill's explanation of the rule in Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Limited [1996] 2BCLC 69, 77 PC: '…the basis of the contra proferentem principle is that the person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests, so that if words leave room for doubt about whether he is intended to have a particular benefit there is reason to suppose that he is not'.

"Putting all these points together, on balance I prefer the judge's view. On Mr Lopian's side is the fact that this is described as an 'Exclusive Sale Agreement' and that some of its terms seem consistent with that. Against that, like the judge, I find it very difficult to read paragraph 4 as meaning anything other than that Mr Stainforth was giving up all his rights over the property. This would only make sense if it was intended that all his liabilities should be discharged at the same time. Otherwise, as the judge said, the proposed 'alternative solution' was no solution at all. Mr Stainforth would be giving up his right to realise his own asset for an indeterminate period, while facing continuing liability for interest at the default rate, without any correlative obligation on Lexi to do anything. Mr Lopian's answer that Lexi would be under an agent's duty of care and of good faith (expressed in clause 9 of the agreement) is an incomplete answer, given the uncertainty in practice of establishing the limits of that duty when set against the reality of the contractual obligation for default interest.

"In the end, I think this is one of those rare cases where the contra proferentem rule may assist in the final solution. As we now know, Lexi were in the position of having a potential purchaser, unknown to Mr Stainforth, at £4.3 million. The potential attractions of the arrangement were obvious, but they may also have wished to hedge their bets. The inadequacies of the agreement may reflect a non-lawyer's attempt to reconcile those competing objectives. Whether or not that it is the correct explanation, there is no unfairness in holding that, having presented the agreement in that form, they should bear the risk of any resulting ambiguity, if it cannot be resolved by more conventional interpretative tools.

"For those reasons I would uphold the judge's decision and dismiss the appeal." [para 17-21]

32.14 Where the reasonable meaning of a term in the context is obvious, the rule will have no place at all.

***GE Frankona Reinsurance Ltd v. CMM Trust No 1400 (The Newfoundland Explorer)* [2006] 1 All ER (Comm) 665**

Under an insurance contract, a yacht was required to be "kept fully crewed at all times". It was severely damaged by fire whilst in dock. There was no-one aboard at the time.

The owner claimed that, as he employed a full crew, the ship was "fully crewed" even though they were not being utilised at the time of the fire. By applying the contra proferentem principle, he claimed, any ambiguity should be resolved in his favour, as it was the insurance company who had inserted the term.

The court accepted that although the meaning of "fully crewed" might vary, depending on what the ship was doing, a ship could not sensibly be said to be "crewed", let alone "fully crewed" if there was no crew on board at all. The wording of the term clearly required at least one crew member to be on board at all times, subject to emergencies. To that extent, the term was not ambiguous and it was unnecessary to apply the *contra proferentem* rule.

33 FUNDAMENTAL BREACH

33.1 There used to be a doctrine – largely developed by Lord Denning – that if an exemption clause purported to exclude liability for a breach which was fundamental to the performance of the contract, then it could not have effect as it would render the obligations under the contract meaningless.

33.2 This doctrine was overruled by the House of Lords in *Photo Production Ltd v. Securicor Transport Ltd [1980] AC 827* in favour of a presumption that it is inherently unlikely that one party would have agreed to the other having no liability for a fundamental breach, so that as a simple matter of construction, such a term – being construed *contra proferentem* – might have a very limited effect – if any. On the other hand, it is open to business people to make contracts and to allocate risks as they think fit, so if the meaning of an exemption clause is clear, it should be given its literal meaning, however harsh.

33.3 ***Photo Production Ltd v. Securicor Transport Ltd*** **[1980] AC 827 (HL)**

"Since the presumption is that the parties by entering into the contract intended to accept the implied obligations exclusion clauses are to be construed strictly and the degree of strictness appropriate to be applied to their construction may properly depend on the extent to which they involve departure from the implied obligations. Since the obligations implied by law in a commercial contract are those which, by judicial consensus over the years or by Parliament in passing a statute, have been regarded as obligations which a reasonable businessman would realise that he was accepting when he entered into a contract of a particular kind, the court's view of the reasonableness of any departure from the implied obligations which would be involved in construing the express words of an exclusion clause in one sense that they are capable of bearing rather than another, is a relevant consideration in deciding what meaning the words were intended by the parties to bear…

In commercial contracts negotiated between business-men capable of looking after their own interests and deciding how risks inherent in the performance of various kinds of contract can be most economically borne (generally by insurance), it is, in my view, wrong to place a strained construction upon the words in an exclusion clause which are clear and fairly susceptible of one meaning only even after due allowance has been made for the presumption in favour of the implied primary and secondary obligations." per Lord Diplock at pages 850/851

"I have no second thoughts as to the main proposition [to be derived from Suisse Atlantique] that the question whether, and to what extent, an exclusion clause is to be applied to a fundamental breach or to a breach of a fundamental term, or indeed to any breach of contract, is a matter of construction of the contract. Many difficult questions arise and will continue to arise in the infinitely varied situations in which contracts come to be breached – by repudiatory breaches, accepted or not, anticipatory breaches, by breaches of conditions or of various terms and whether by negligent or deliberate action or otherwise. But there are ample resources in the normal rules of contract law for dealing with these without the superimposition of a judicially invented rule of law." per Lord Wilberforce at p 842

33.4 These speeches were considered in *Internet Broadcasting Corp Ltd (t/a NETTV) v. Mar LLC (t/a MARHedge) [2010] 1 All ER (Comm) 112*, to a somewhat surprising effect, seeming to revert back to the presumption that an exemption clause could not cover a fundamental breach.

33.5 ***Internet Broadcasting Corp Ltd (t/a NETTV) v. Mar LLC (t/a MARHedge)*** **[2010] 1 All ER (Comm) 112**

NETTV is in the business of constructing and providing interactive internet television platforms. It made a contract with MARHedge, a hedge fund company, to provide an internet TV channel, inter alia, to broadcast MARHedge's conferences and to sell subscriptions to the channel. Following some complex business negotiations – held in a Starbucks! – they varied the contract so that it became increasingly profitable for NETTV. However, MARHedge then suddenly gave notice to terminate the contract causing enormous financial losses to NETTV. MARHedge admitted that this was in breach of the contract, but claimed to be exempted from liability by the following exemption clause:

"16.Nothing in this Agreement shall operate to exclude or limit either party's liability for death or personal injury caused by its default or negligence, any breach of the terms implied by the sale of goods and supply of goods and services legislation, fraud, or any other liability that cannot be excluded or limited under applicable law.

17.Subject to clause 16 neither party will be liable to the other for any damage to software, damage to or loss of data, loss of profit, anticipated profit, revenues, anticipated savings, goodwill or business opportunity, or for any indirect or consequential loss or damage.

18.Subject to clause 17, NETTV's aggregate liability in respect of claims based on events relating to this Agreement shall not exceed the total amount of cash fees paid by the Client to NETTV in connection with this Agreement or any collateral contract, whether in contract or tort (including negligence). NETTV shall not be liable for the value of media contributed by the Client as part of this Agreement."

NETTV claimed that clause 17 was not meant to apply to deliberate breaches as this would in effect mean that there were no enforceable obligations under the contract, MARHedge claimed that the literal words of the agreement covered it for any losses.

Whilst acknowledging that there was no doctrine of fundamental breach in the Lord Denning sense, the court did note that it was sometimes inappropriate to adopt a literal approach to interpreting exemption clauses.

It was held that in the absence of very strong words – such as "under no circumstances" on "including deliberate repudiatory acts" – there would be a presumption that an exemption clause is not meant to cover a deliberate repudiatory breach which would defeat the main object of the contract, even if the literal meaning of the exemption clause would seem to cover it. On that basis, this exemption clause was NOT effective to cover the breach in question.

Per G Moss QC (Deputy HC Judge) at para 25:

"It is clear that, even as a matter of construction, as opposed to a rule of law, an exemption clause will never normally be interpreted as extending to a situation which would defeat the main object of the contract or create commercial absurdity, despite the literal meaning of the words used."

Per G Moss QC (Deputy HC Judge) at para 33:

"The principles I deduce from the authorities which are relevant to the present type of case of deliberate, repudiatory breach involving personal wrongdoing are as follows:

(1) There is no rule of law applicable and the question is one of construction.
(2) There is a presumption, which appears to be a strong presumption, against the exemption clause being construed so as to cover deliberate, repudiatory breach.
(3) The words needed to cover a deliberate, repudiatory breach need to be very 'clear' in the sense of using 'strong' language such as 'under no circumstances'…
(4) There is a particular need to use 'clear', in the sense of 'strong', language where the exemption clause is intended to cover deliberate wrongdoing by a party in respect of a breach which cannot, or is unlikely to be, covered by insurance. Language such as 'including deliberate repudiatory acts by [the parties to the contract] themselves…' would need to be used in such a case.
(5) Words which, in a literal sense, cover a deliberate repudiatory breach will not be construed so as to do so if that would defeat the 'main object' of the contract…"

Per G Moss QC (Deputy HC Judge) at para 35:

"The starting point must be the rebuttable presumption that the clause is not intended to cover a deliberate repudiatory breach of the contract. In addition, a deliberate, personal repudiation by Mr Lynch as the relevant mind of the Defendant is either uninsurable or very unlikely to be insurable.

There would have to be very clear, in the sense of strong, language to persuade a court that the parties intended the words to cover such a case. Pointing to a mere literal meaning is not enough."

33.6 However, this interpretation of *Photo Production Ltd v Securicor Transport Ltd* [1980] has since been disparaged as stating virtually the opposite of what the House of Lords meant.

Astrazeneca UK Ltd v. Albermarle International Corp **[2011] 2 CLC 252 (QBD Commercial Court)**

Per Flaux J at para 289:

"With the greatest respect to the learned Deputy Judge, in my judgment, this conclusion is wrong on the modern authorities and effectively seeks to revive the doctrine of fundamental breach (which the House of Lords in both Suisse Atlantique and Photo Production v Securicor concluded was no longer good law), albeit under the guise of 'deliberate repudiatory breach'."

Per Flaux J at para 290:

"What the learned Deputy Judge appears to have done is to quote selectively from the speeches in those cases, whereas full consideration of the relevant speeches demonstrates that the cases do not support the proposition which he set out in paragraph 33 of the judgment."

Per Flaux J at para 297:

"*Lord Wilberforce in Photo Production (with whose analysis all their other Lordships agreed), in a passage which the learned Deputy Judge did not cite in MARHedge, effectively sounded the death knell of the doctrine of fundamental breach, in terms which are wholly inconsistent with there being any such presumption as the learned Deputy Judge found."*

34 EXEMPTING LIABILITY FOR NEGLIGENCE

34.1 As a matter of construction, the courts will generally hold that a clause is ineffective to exempt liability for negligence (including contractual negligence) unless this is specifically covered by clear words.

34.2 ***Hollier v. Rambler Motors Ltd*** **[1972] 2 QB 71 (CA)** (see above at 32.6)

A further ground for holding that the exclusion clause was ineffective was that it was not specific enough to defeat a claim of contractual negligence:

"It is well settled that a clause excluding liability for negligence should make its meaning plain on its face to any ordinarily literate and sensible person." per Salmon LJ at p 78

"To my mind, if the defendants were seeking to exclude their responsibility for a fire caused by their own negligence, they ought to have done so in far plainer language than the language here used."
per Salmon LJ at p 81

34.3 This method of construction has developed as a means of protecting the victim of a breach who might not understand the full significance of an exemption clause.

34.4 ***Gillespie Bros & Co Ltd v. Roy Bowles Transport Ltd*** **[1973] QB 400 (CA)**

"It is, however, a fundamental consideration in the construction of contracts of this kind that it is inherently improbable that one party to the contract should intend to absolve the other party from the consequences of the latter's own negligence. The intention to do so must, therefore, be made perfectly clear, for otherwise the court will conclude that the exempted party was only to be free from liability in respect of damages occasioned by causes other than negligence for which he is answerable."
per Buckley LJ at 419

34.5 However, the word "negligence" or some synonym in the exemption clause is not necessarily needed as long as the intention to cover negligence liability is clear. The matter was discussed by the Privy Council in *Canada Steamship Lines Ltd v. The King* [1952] AC 192.

Canada Steamship Lines Ltd v. The King **[1952] AC 192 (Privy Council, Canada)**

By clause 7 of a lease by which the Crown leased a freight shed to the appellant company it was provided that "the lessee shall not have any claim against the lessor for damage to goods being in the said shed." Owing to the negligence of the Crown's servants while using an oxy-acetylene torch to effect repairs in the shed, a fire broke out which destroyed the shed and all its contents. In holding that the exemption clause was not effective to excuse the Crown from liability for negligence, Lord Morton made the following observation:

"Their Lordships think that the duty of a court in approaching the consideration of such clauses may be summarised as follows:

(1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called 'the proferens') from the consequences of the negligence of his own servants, effect must be given to that provision…

(2) If there is no express reference to negligence, the court must consider whether the words are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens…

(2) If the words used are wide enough for the above purpose, the court must then consider whether the head of damage may be based on some ground other than that of negligence… The existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are, prima facie, wide enough to cover negligence."

per Lord Molton at p 208

34.6 ***Smith v. South Wales Switchgear*** **[1978] 1 WLR 165 (HL)**

In a case involving the effect of an indemnity clause, the House of Lords suggested obiter that the words "in respect of any injury or damage whatsoever to any property" in an exemption clause might, in some cases, be wide enough to cover negligence liability at common law.

34.7 Furthermore, if an exemption clause does not mention "negligence liability" but covers only a situation of negligence liability, it is likely to be construed as valid (at common law) as it would otherwise have no meaning.

For example, an exclusion notice at a fairground says:

"We accept no responsibility for any property damage you may suffer using this roller-coaster."

As the fairground owners would generally not be liable to a customer for property damage unless they caused it by their negligence, the clause must refer to negligence liability to make sense.

34.8 ***Rutter v. Palmer*** **[1922] 2 KB 87 (CA)**

"In construing an exemption clause certain general rules may be applied: First the defendant is not exempted from liability for the negligence of his servants unless adequate words are used; secondly, the liability of the defendant apart from the exempting words must be ascertained; then the particular clause in question must be considered; and if the only liability of the party pleading the exemption is a liability for negligence, the clause will more readily operate to exempt him." per Scrutton LJ at p 92

34.9 The rules about how to exclude negligence liability are merely rules of construction (rather than binding principles) so cases on these matters may not be consistent.

34.10 ***Stent Foundations Ltd v. M J Gleeson Group plc*** **[2001] BLR 134**

Gleeson was the main contractor on a site in London. Stent was a piling subcontractor who ran a mobile crane on the site. Gleeson's crane struck Stent's crane and damaged it. The subcontract contained a clause which provided that the subcontractor was responsible for and would indemnify the contractor against any claims in respect of the plant or tools of the subcontractor or his workmen which were lost or damaged "by fire or any other cause".

Gleeson claimed that the words "any other cause" included his negligence. The court held that they did not, but referred only to such matters as are akin to fire, such as theft or accident.

34.11 It appears that the commonly used phrase 'Enter at your own risk' has no legal meaning at all.

Casson v. Ostley **[2001] EWCA Civ 1013 (CA)**

Casson hired Ostley to do some renovation work on their farm buildings. Ostley's terms of business provided, *inter alia*, as follows:

"Works covered by this estimate, existing structures in which we shall be working, and unfixed materials shall be at the sole risk of the client as regards loss or damage by fire and the client shall maintain a proper policy of insurance against that risk in an adequate sum. If any loss or damage affecting the works is so occasioned by fire, the client shall pay to us the full value of all work and materials then executed and delivered."

Due to the negligence of Ostley's unauthorised subcontractors a fire broke out causing £492,000 worth of damage. Ostley claimed to be protected by the clause, contending that the words "sole risk" combined with the insurance requirement covered them for negligence liability.

Held: Ostley were liable for the damage. It was inherently improbable that a private person engaging a builder would wish to exempt him from his own negligence, even if that private person was obliged to insure. A clause needed plain words to cover such negligence and the phrase "sole risk" was not enough.

Furthermore, applying the tests in Canada Steamship Lines, although the clause was apparently wide enough to exempt the builder from negligence it did not do so, as there were a number of far from fanciful examples in which, without negligence, a builder might be held liable for a fire.

34.12 A term excluding liability for negligence will often be void under UCTA 1977 or the CRA 2015.

VII EXEMPTION CLAUSES UNDER STATUTE

The Unfair Contract Terms Act 1977 and the Consumer Rights Act 2015

35 INTRODUCTION

35.1 The Unfair Contract Terms Act 1977 (known as UCTA 1977) revolutionised the way in which exemption clauses were interpreted. Despite its name, it applies not only to contracts but to tortious liability as well.

35.2 Although the Act specifically covered consumer contracts, it was supplemented (at the insistence of a European Directive) by the Unfair Terms in Consumer Contracts Regulations 1994 and 1999. In October 2015, all the consumer related provisions in UCTA 1977 were repealed, together with the whole of the Unfair Terms in Consumer Contracts Regulations 1999, to be replaced by Part 2 of the Consumer Rights Act 2015.

35.3 These two Acts now, therefore, need to be considered in parallel, depending on whether one is dealing with a commercial contract where both parties are acting in the course of business; or a consumer contract, which involves: “an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession.” (CRA 2015, section 2(3))

36 DO THE ACTS APPLY?

36.1 **Unfair Contract Terms Act 1977, section 1 (3)**

UCTA 1977 applies to torts or breaches of contract done in the course of a business or from the occupation of premises used for business purposes, other than consumer contracts.

36.2 **Consumer Rights Act 2015, section 61**

CRA 2015 Part 2 applies to consumer contracts to supply goods, digital content or services, but not to employment or apprenticeship contracts

37 DOES THE BREACH OF CONTRACT AMOUNT TO TORTIOUS NEGLIGENCE?

37.1 Where there has been negligence, either as a matter of tort, or as a breach of a contract term to exercise due care and attention (as under The Supply of Goods and Services Act 1982, section 13), then UCTA, section 2 or CRA, section 65 may apply. These prohibit any exemption clause from covering personal injury caused by negligence. UCTA also subjects property damage exemption to the test of “reasonableness”.

37.2 **Unfair Contract Terms Act 1977, section 2**

(1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.

(2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.

37.3 **Consumer Rights Act 2015, section 65**

(1) A trader cannot by a term of a consumer contract or by a consumer notice exclude or restrict liability for death or personal injury resulting from negligence.

(2) Where a term of a consumer contract, or a consumer notice, purports to exclude or restrict a trader’s liability for negligence, a person is not to be taken to have voluntarily accepted any risk merely because the person agreed to or knew about the term or notice.

(3) In this section "personal injury" includes any disease and any impairment of physical or mental condition.

38 HAS HERE BEEN A BREACH OF A STANDARD FORM CONTRACT?

38.1 This is now only relevant to non-consumer contracts under UCTA 1977. Under section 3, any exemption or variation clause in a standard form contract will only be valid if it is "reasonable".

38.2 **Unfair Contract Terms Act 1977, section 3**

(1) This section applies as between contracting parties where one of them deals on the other's written standard terms of business.

(2) As against that party, the other cannot by reference to any contract term–

(a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or

(b) claim to be entitled–

(i) to render a contractual performance substantially different from that which was reasonably expected of him, or
(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,

except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness.

39 IS THERE AN UNFAIR TERM IN A CONSUMER CONTRACT?

39.1 CRA, section 62 is an amalgamated version of section 3 of UCTA and the now repealed UTCCR 1999, though more resembling the latter. The effect is to make "unfair" terms in consumer contracts not binding on the consumer – unless he or she decides to rely on them.

39.2 The definition of "unfair" is taken from the UTCCR, which is unfortunate because the reference to "the requirement of good faith" has always proven problematic in the English courts as there is no such requirement in general contract law: the phrase reveals the EU origins of the law.[5]

39.3 **Consumer Rights Act 2015, section 62**

(1) An unfair term of a consumer contract is not binding on the consumer.

(2) An unfair consumer notice is not binding on the consumer.

(3) This does not prevent the consumer from relying on the term or notice if the consumer chooses to do so.

(4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.

(5) Whether a term is fair is to be determined–

(a) by taking into account the nature of the subject matter of the contract, and
(b) by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends.

[5] For a judicial discussion of this issue see *Yam Send Pte Ltd. v. International Trade Corp Ltd.* [2013] 1 All ER (Comm) 1321

40 THE MEANING OF 'REASONABLE' IN THE UCTA 1977

40.1 UCTA 1977, section 11 gives guidance as to the criteria of reasonableness. These apparently differ depending upon the kind of liability it is purported to exclude or limit. The extra criteria listed in Schedule 2 of the Act are stated to apply only to sections 6 and 7, but they seem to be relevant to all the sections.

40.2 ***Stewart Gill Ltd v. Horatio Meyer & Co Ltd*** **[1992] 1 QB 600 (CA)**

"Although Schedule 2 does not apply in the present case, the considerations there set out are usually regarded as being of general application to the question of reasonableness."

per Stuart-Smith LJ at p 608

40.3 **Unfair Contract Terms Act 1977, section 11**

(1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act…is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.

(2) In determining for the purposes of section 6 or 7 above whether a contract term satisfies the requirement of reasonableness, regard shall be had in particular to the matters specified in Schedule 2 to this Act; but this subsection does not prevent the court or arbitrator from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any relevant liability is not a term of the contract.

(3) In relation to a notice (not being a notice having contractual effect), the requirement of reasonableness under this Act is that it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen.

(4) Where by reference to a contract term or notice a person seeks to restrict liability to a specified sum of money, and the question arises (under this or any other Act) whether the term or notice satisfies the requirement of reasonableness, regard shall be had in particular (but without prejudice to subsection (2) above in the case of contract terms) to–

(a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and
(b) how far it was open to him to cover himself by insurance.

(5) It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does.

40.4 **Unfair Contract Terms Act 1977, Schedule 2 Guidelines for Application of Reasonableness Test**

The matters to which regard is to be had in particular for the purposes of sections 6(3), 7(3) and 7(4)…are any of the following which appear to be relevant–

(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;
(b) whether the customer received an inducement to agree to the terms, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;
(c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);
(d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;
(e) whether the goods were manufactured, processed or adapted to the special order of the customer.

40.5 The criteria for what is "reasonable" has been discussed in two major cases.

40.6 ***George Mitchell (Chesterhall) Ltd .v Finney Lock Seeds Ltd*** **[1983] 2 All ER 737 (HL)**

In the Court of Appeal [1983] 1 All ER 108, Lord Denning MR described the facts with his usual gusto:

"Many of you know Lewis Carroll's Through the Looking-Glass. In it, there are these words:

'The time has come, the Walrus said,
To talk of many things:
Of shoes–and ships–and sealing wax–
Of cabbages–and kings…'

Today it is not 'of cabbages and kings', but of cabbages and whatnots. Some farmers, called George Mitchell (Chesterhall) Ltd ordered 30 lb of cabbage seed. It was supplied. It looked just like cabbage seed. No-one could say it was not. The farmers planted it over 63 acres. Six months later there appeared out of the ground a lot of loose green leaves. They looked like cabbage leaves but they never turned in. They had no hearts. They were not 'cabbages' in our common parlance because they had no hearts. The crop was useless for human consumption. Sheep or cattle might eat it if hungry enough. It was commercially useless. The price of the seed was £192. The loss to the farmers was over £61,000. They claimed damages from the seed merchants, Finney Lock seeds Ltd The judge awarded them that sum with interest. The total comes to nearly £100,000.

The seed merchants appeal to this court. They say that they supplied the seed on a printed clause by which their liability was limited to the cost of the seed, that is £192." per Lord Denning MR at p 111

It was common ground that the seed ordered was "Finneys Late Dutch winter white cabbage seed" but what was delivered was a variety of autumn cabbage seed, and the crop failed both because it was the wrong kind of seed and because, even as autumn seed, it was of very poor quality. The contract of supply contained the following clause:

"We hereby exclude all liability for any loss or damage arising from the use of any seeds or plants supplied by us and for any consequential loss or damage arising out of such use or any failure in the performance of or any defect in any seeds or plants supplied by us or for any other loss or damage whatsoever save for, at our option, liability for any…replacement or refund."

As a matter of construction of the contract, the term did appear to cover the breach and so was valid at common law. However, it failed the "reasonable test" of UCTA 1977. Indeed, Lord Denning went so far as to say that the old common law was now largely irrelevant in the shadow of UCTA 1977:

"Just as in other fields of law we have done away with the multitude of cases on 'common employment', 'last opportunity', 'invitees' and 'licencees' and so forth, so also in this field we should do away with the multitude of cases on exemption clauses. We should no longer have to go through all kinds of gymnastic contortions to get round them. We should no longer have to harass our students with the study of them." per Lord Denning MR [1983] 1 All ER 108 at p 115

Sorry students! The harassment continues.

Whilst not providing any definitive statements as to the correct interpretation of what is "reasonable", both the Court of Appeal and the House of Lords did provide some useful guidelines, particularly in relation to limitation clauses:

Court of Appeal

First, Lord Denning made the general comment that *"a limitation clause is more likely to be reasonable than an exclusion clause."* p 116

He then considered the case in hand, and in holding that this limitation clause was not reasonable, he noted in particular the importance, inter alia, of normal trade practice; the availability of insurance to the sellers; and the negligence of the sellers:

"Our present case is very much on the borderline. There is this to be said in favour of the seed merchants. The price of this cabbage seed was small: £192. The damages claimed are high: £61,000. But there is this to be said on the other side. The clause was not negotiated between persons of equal bargaining power. It was inserted by the seed merchants in their invoices without any negotiation with the farmers.

"To this I would add that the seed merchants rarely, if ever, invoked the clause. Their very frank director said: 'The trade does not stand on the strict letter of the clause… Almost invariably when a customer justifiably complains, the trade pays something more than a refund.' The papers contain many illustrations where the clause was not invoked and a settlement was reached.

"Next, I would point out that the buyers had no opportunity at all of knowing or discovering that the seed was not cabbage seed, whereas the sellers could and should have known that it was the wrong seed altogether. The buyers were not covered by insurance against the risk. Nor could they insure. But as to the seed merchants, the judge said: 'I am entirely satisfied that it is possible for seedsmen to insure against this risk. I am entirely satisfied that the cost of so doing would not materially raise the price of seeds on the market…'

To that I would add this further point. Such a mistake as this could not have happened without serious negligence on the part of the seed merchants themselves or their Dutch suppliers. So serious that it would not be fair to enable them to escape responsibility for it." per Lord Denning MR at p 117 (CA)

House of Lords

Lord Bridge first noted that deciding what is "reasonable" is not an exact science and there may be a legitimate difference of opinion between judges.

"It may, therefore, be appropriate to consider how an original decision as to what is 'fair and reasonable' made in the application of any of these provisions should be approached by an appellate court. It would not be accurate to describe such a decision as an exercise of discretion. But a decision under any of the provisions referred to will have this in common with the exercise of discretion, that, in having regard to the matters to which the modified section 55 (5) of the Act of 1979, or section 11 of the Act of 1977 direct attention, the court must entertain a whole range of considerations, put them in the scales on one side or the other, and decide at the end of the day on which side the balance comes down.

There will sometimes be room for a legitimate difference of judicial opinion as to what the answer should be, where it will be impossible to say that one view is demonstrably wrong and the other demonstrably right. It must follow, in my view, that, when asked to review such a decision on appeal, the appellate court should treat the original decision with the utmost respect and refrain from interference with it unless satisfied that it proceeded on some erroneous principle or was plainly and obviously wrong." per Lord Bridge at p 741

Second, in applying the test to the case in point, and in finding the limitation clause to be unreasonable, Lord Bridge also emphasised the importance of trade practice, the evidence of negligence and the availability of insurance to the party in breach.

"The decisive factor, however, appears from the evidence of four witnesses (including the chairman of the appellant company)… They said that it has always been their practice, unsuccessfully attempted in the instant case, to negotiate settlements of farmers' claims for damages in excess of the price of the seeds, if they thought that the claims were 'genuine' and 'justified'. This evidence indicated a clear recognition by seedsmen in general, and the appellants in particular, that reliance on the limitation of liability imposed by the relevant condition would not be fair or reasonable.

Two further factors, if more were needed, weigh the scales in favour of the respondents. The supply of autumn, instead of winter, cabbage seed was due to the negligence of the appellants' sister company. Irrespective of its quality, the autumn variety supplied could not, according to the appellants' own evidence, be grown commercially in East Lothian. Finally, as the trial judge found, seedsmen could insure against the risk of crop failure caused by supply of the wrong variety of seeds without materially increasing the price of seeds." per Lord Bridge at p 744

40.7 *George Mitchell (Chesterhall) Ltd v. Finney Lock Seeds Ltd* was distinguished by the Court of Appeal in *Watford Electronics Limited v. Sanderson CFL Ltd,* where a very similar clause was held to be reasonable in all the circumstances of the case.

40.8 ***Watford Electronics Limited v. Sanderson CFL Limited*** **[2001] 1 All ER (Comm) 696 (CA)**

Watford Electronics is a family owned business engaged in the sale of computer products by mail order. Sanderson are a supplier of software products, in particular a product known as "Mailbrain" which is designed for use with mail order marketing.

Watford bought "Mailbrain" from Sanderson with some bespoke modifications, for a cost of £15,508 but it failed to work properly and eventually Watford replaced it with a new system bought from another supplier.

Watford sued Sanderson for breach of contract, claiming £4,402,694 for loss of profits; £996,063 for the increased costs of working with a defective system; and £119,204 for the cost of replacing the defective software.

Sanderson claimed, *inter alia,* that they were protected under the following terms in the contract:

"Neither the company nor the customer shall be liable to the other for any claims for indirect or consequential losses whether arising from negligence or otherwise. In no event shall the company's liability under the contract exceed the price paid by the customer to the company for the equipment connected with any claim."

Watford claimed that these terms were unreasonable under the Unfair Terms Act 1977.

In deciding that the terms were reasonable and, therefore, effective to exempt liability, the Court of Appeal made several important observations about the requirement that the relevant contract term was a: "fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made" as per section 11.

Although section 11(4) refers only to limitation clauses, it is still relevant to consider in the case of exclusion clauses the resources of the parties and the availability of insurance.

It was relevant that Watford had similar exemption clauses in their own standard form contract which they would enforce against their own clients, as they could not, therefore, argue that they were unaware of their effect or of the commercial considerations which lead a supplier to include such terms, in particular the price at which he was prepared to sell.

Both parties should have realised the risk of substantial loss of profits etc if the system failed (though Watford were in a better position to quantify them) and it was normal and reasonable in a commercial contract to make proper provision for where such a risk would lie and for that to affect the price. Where parties are of equal bargaining power (as here) it is open to them to negotiate where the risk of failure should lie (including the burden and cost of insurance) and as Watford secured substantial concessions on the price from Sanderson on the basis that the exemption clauses were valid they could not now claim otherwise:

"Where experienced businessmen representing substantial companies of equal bargaining power negotiate an agreement, they may be taken to have had regard to the matters known to them. They should, in my view be taken to be the best judge of the commercial fairness of the agreement they have made; including the fairness of each of the terms in that agreement. They should be taken to be the best judge on the question whether the terms of the agreement are reasonable. The court should not assume that either is likely to commit his company to an agreement which he thinks is unfair, or which he thinks includes unreasonable terms. Unless satisfied that one party has, in effect, taken unfair advantage of the other – or that a term is so unreasonable that it cannot properly have been understood or considered – the court should not interfere." per Chadwick LJ at para 55

40.9 *Watford Electronics Limited v. Sanderson CFL Ltd* was applied in the following case.

***Regus (UK) Ltd v. Epcot Solutions Ltd* [2009] 1 All ER (Comm) 586 (CA)**

R provided serviced office accommodation. E took space in R's building near Heathrow, but due to the inadequacy of the air-conditioning E was unable to use the offices and refused to pay the fee. R sued for the fees and E counter-claimed for £626 million for loss and expenses caused to it by the breach.

R relied on the exemption clause in its contract with E:

(1) We are not liable for any loss as a result of our failure to provide a service as a result of mechanical breakdown, strike, delay, failure of staff, termination of our interest in the building containing the business centre or otherwise unless we do so deliberately or are negligent. We are also not liable for any failure until you have told us about it and given us a reasonable time to put it right.

(2) You agree:

(a) that we will not have any liability for any loss, damage or claim which arises as a result of, or in connection with, your agreement and/or your use of the services except to the extent that such loss, damage, expense or claim is directly attributable to our deliberate act or our negligence (our liability); and

(b) that our liability will be subject to the limits set out in the next paragraph.

(3) We will not in any circumstances have any liability for loss of business, loss of profits, loss of anticipated savings, loss of or damage to data, third party claims or any consequential loss. We strongly advise you to insure against all such potential loss, damage, expense or liability.

We will be liable without limit for personal injury or death:

up to a maximum of £1 million (for any one event or series of connected events) for damage to your personal property;

up to a maximum equal to 125% of the total fees paid under your agreement up to the date on which the claim in question arises or £50,000 (whichever is the higher), in respect of all other losses, damages, expenses or claims.

The trial judge found that the clause was unreasonable under UCTA 1977, section 3 as it excluded the possibility of any remedy at all for the breach in question.

Applying their decision in *Watford Electronics v Sanderson*, the Court of Appeal overturned this decision and held that the clause was reasonable and valid.

Inter alia, the Court of Appeal noted that:

- The clause did not purport to exclude all liability, as the judge had suggested. There was no suggestion of excluding liability for fraud or wilful damage for example.
- Epcot's Mr Randhawa was an "intelligent and experienced businessman"
- He was well aware of Regus's standard terms when he entered into the contract and had contracted before on identical terms.
- He used a similar exclusion of liability for indirect or consequential losses in his own business (as did the customer in Watford).
- Regus advised its customers to take out their own insurance, and it was generally more economical for the customer to do so rather than for Regus.
- There was no inequality of bargaining power. Regus had several competitors on the site and Epcot could easily have gone elsewhere for a similar service.

41 THE MEANING OF 'UNFAIR' IN THE CRA 2015

41.1 Schedule 2 of the Act contains an indicative (i.e. just for guidance) list of what terms might be considered "unfair". It is likely that – apart from this – the courts will continue to consider "unfair" to mean much the same thing as "unreasonable" under UCTA.[6]

Consumer Rights Act 2015, Schedule 2

Consumer Contract Terms which may be regarded as Unfair

1 A term which has the object or effect of excluding or limiting the trader's liability in the event of the death of or personal injury to the consumer resulting from an act or omission of the trader.

2 A term which has the object or effect of inappropriately excluding or limiting the legal rights of the consumer in relation to the trader or another party in the event of total or partial non-performance or inadequate performance by the trader of any of the contractual obligations, including the option of offsetting a debt owed to the trader against any claim which the consumer may have against the trader.

3 A term which has the object or effect of making an agreement binding on the consumer in a case where the provision of services by the trader is subject to a condition whose realisation depends on the trader's will alone.

4 A term which has the object or effect of permitting the trader to retain sums paid by the consumer where the consumer decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the trader where the trader is the party cancelling the contract.

5 A term which has the object or effect of requiring that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum in compensation or for services which have not been supplied.

6 A term which has the object or effect of requiring a consumer who fails to fulfil his obligations under the contract to pay a disproportionately high sum in compensation.

7 A term which has the object or effect of authorising the trader to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the trader to retain the sums paid for services not yet supplied by the trader where it is the trader who dissolves the contract.

8 A term which has the object or effect of enabling the trader to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so.

9 A term which has the object or effect of automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express a desire not to extend the contract is unreasonably early.

10 A term which has the object or effect of irrevocably binding the consumer to terms with which the consumer has had no real opportunity of becoming acquainted before the conclusion of the contract.

11 A term which has the object or effect of enabling the trader to alter the terms of the contract unilaterally without a valid reason which is specified in the contract.

[6] In recent cases decided under the old legislation, the court has suggested that insofar as the new rules replicate the old ones, they will be interpreted in the same way. See for example *Wood v. Tui Travel plc* [2017] EWCA Civ 11

12 A term which has the object or effect of permitting the trader to determine the characteristics of the subject matter of the contract after the consumer has become bound by it.

13 A term which has the object or effect of enabling the trader to alter unilaterally without a valid reason any characteristics of the goods, digital content or services to be provided.

14 A term which has the object or effect of giving the trader the discretion to decide the price payable under the contract after the consumer has become bound by it, where no price or method of determining the price is agreed when the consumer becomes bound.

15 A term which has the object or effect of permitting a trader to increase the price of goods, digital content or services without giving the consumer the right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded.

16 A term which has the object or effect of giving the trader the right to determine whether the goods, digital content or services supplied are in conformity with the contract, or giving the trader the exclusive right to interpret any term of the contract.

17 A term which has the object or effect of limiting the trader's obligation to respect commitments undertaken by the trader's agents or making the trader's commitments subject to compliance with a particular formality.

18 A term which has the object or effect of obliging the consumer to fulfil all of the consumer's obligations where the trader does not perform the trader's obligations.

19 A term which has the object or effect of allowing the trader to transfer the trader's rights and obligations under the contract, where this may reduce the guarantees for the consumer, without the consumer's agreement.

20 A term which has the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, in particular by–

(a) requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions,
(b) unduly restricting the evidence available to the consumer, or
(c) imposing on the consumer a burden of proof which, according to the applicable law, should lie with another party to the contract.

41.2 A term which specifies either the main subject matter of the contract or the price to be paid is not subject to the test of unfairness. In other words, the courts will not consider the adequacy of the consideration, so if the consumer is paying too much for something, that is simply a matter of caveat emptor as at common law.

Consumer Rights Act 2015, section 64

Exclusion from Assessment of Fairness

(1) A term of a consumer contract may not be assessed for fairness under section 62 to the extent that–

(a) it specifies the main subject matter of the contract; or
(b) the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it.

41.3 These limitations of the definition of 'unfair' have meant that this aspect of the CRA 2015, like the UCTCR regulations on which it is based, has proved to be of limited value to consumers. As long as the consumer has had proper notice of the terms, and the terms are written in plain language, a court is unlikely to hold them to be 'unfair' if the issue with them is simply that the consumer is being asked to pay what s/he thinks is an extortionate amount.

41.4 ***Office of Fair Trading v. Abbey National plc*** **[2010] 1 AC 696 (Supreme Court)**

This case was decided under the similar provisions of the Unfair Terms in Consumer Contracts Regulations 1999, and so is still regarded as a leading case on the interpretation of the CRA 2015

Under reg 6(2) of the Regulations (as now under s.64 of the CRA 2015) "In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate—(a) to the definition of the main subject matter of the contract, or (b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange."

The issue in the case was whether 'unfair' bank charges were part of the 'price or remuneration' for a bank loan. The Supreme Court held that the charges were covered by reg. 6, and so their fairness could not be challenged under the Regulations.

Without judging whether or not the charges were unfair, the court held that although charges for unauthorised overdrafts were not the prices paid in exchange for the transactions in question, nor default charges designed to discourage customers from overdrawing on their accounts without prior arrangement, they were still monetary consideration for the package of banking services supplied to current account customers; that such charges were an important part of the defendants' charging structure and it was irrelevant that they were contingent and that the majority of customers did not incur them; and that, accordingly, the relevant charges constituted part of the price or remuneration for the banking services provided, falling squarely within regulation 6(2)(b)

41.5 ***ParkingEye Ltd v. Beavis*** **[2016] A.C. 1172 (Supreme Court)**[7]

The defendant parked his car in a privately-owned shopping centre car park which was managed by the claimant. Notices prominently displayed at the entrance and throughout the car park stipulated that the maximum permitted stay was two hours, that parking was free up to that time but that £85 would be charged to those who stayed longer, reducible to £50 if paid within 14 days. The defendant drove out of the car park nearly an hour after the permitted time and was charged £85 by the claimant, which he did not pay. The claimant brought proceedings in the county court to recover the charge.

The judge gave judgment for the claimant, rejecting the defendant's argument that he should not have to pay the charge because, *inter alia*, it was unfair and, therefore, unenforceable by virtue of regulation 8 of the Unfair Terms in Consumer Contracts Regulations 1999.

On appeal, the Supreme Court held that although the charge might fall under the description of potentially unfair terms at paragraph 1(e) of Schedule 2 to the Unfair Terms in Consumer Contracts Regulations 1999 , it did not come within the basic test for unfairness in regulations 5(1) and 6(1) ; that any imbalance in the parties' rights did not arise contrary to the requirements of good faith, since the claimant and the owners had a legitimate interest in inducing the defendant not to overstay in order to enable other members of the public to use the available parking space, the charge was no higher than was necessary to achieve that objective, and the defendant had been well aware of the two-hour limit and could reasonably have been expected to comply with it; and that, accordingly, the charge imposed on the defendant was not unfair and so did not infringe the Regulations.

41.6 ***Indigo Park Services UK Ltd v. Watson*** **(2017) GWD 40-610, Sheriff Court, Dundee**

A car park management company (P) raised an action for payment against a student nurse (W) in respect of car parking charges and additional costs of enforcement action to recover the charges. P invited the court to award £1,088, being £320 in respect of eight separate £40 parking charges, and £768, being £96 in respect of each ticket in relation to reasonable recovery costs. P claimed that W had parked in two car parks at a hospital on various dates and at various times in 2016 without displaying a valid parking ticket, which W admitted, however, he maintained that he was not liable to indemnify P for costs incurred by way of enforcement action and invited the court to restrict decree to £320, namely the parking charges.

W submitted *inter alia* that the costs terms was unfair under the Consumer Rights Act 2015 and therefore not binding on him.

[7] This case is also known as *Makdessi v. Cavendish Square Holdings BV* [2016] A.C. 1172, It is the leading case on penalty clauses, which we will consider later in the course

Held: Following *Makdessi v. Cavendish Square Holdings BV* [2016] A.C. 1172, the term was not unfair under the Consumer Rights Act 2015, and W was liable to pay the parking charges.

The costs terms was not contrary to the requirements of good faith because P had a legitimate interest in imposing liability on W beyond what would have been recoverable at common law, namely in the efficient management of the car park. Furthermore, it was reasonable to assume that the reasonable car park user would have agreed to the costs term if individually negotiating terms, there was nothing unfair in the contractual terms under the 2015 Act and the costs term clause was transparent in terms of s.68 of the 2015 Act where it was expressed in plain and intelligible language and was legible.

42 LIABILITY THAT CANNOT BE EXCLUDED OR RESTRICTED UNDER THE CRA 2015

42.1 There are certain liabilities which cannot be excluded or restricted under the CRA 2015. Where there is an exemption clause which purports to restrict such liability, it will simply not be binding.

42.2 **Consumer Rights Act 2015, section 31**

(1) A term of a contract to supply goods is not binding on the consumer to the extent that it would exclude or restrict the trader's liability arising under any of these provisions—

(a) section 9 (goods to be of satisfactory quality);
(b) section 10 (goods to be fit for particular purpose);
(c) section 11 (goods to be as described);
(d) section 12 (other pre-contract information included in contract);
(e) section 13 (goods to match a sample);
(f) section 14 (goods to match a model seen or examined);
(g) section 15 (installation as part of conformity of the goods with the contract);
(h) section 16 (goods not conforming to contract if digital content does not conform);
(i) section 17 (trader to have right to supply the goods etc);
(j) section 28 (delivery of goods);
(k) section 29 (passing of risk).

42.3 **Consumer Rights Act 2015, section 57**

(1) A term of a contract to supply services is not binding on the consumer to the extent that it would exclude the trader's liability arising under section 49 (service to be performed with reasonable care and skill).

(2) Subject to section 50(2), a term of a contract to supply services is not binding on the consumer to the extent that it would exclude the trader's liability arising under section 50 (information about trader or service to be binding).

(3) A term of a contract to supply services is not binding on the consumer to the extent that it would restrict the trader's liability arising under any of sections 49 and 50 and, where they apply, sections 51 and 52 (reasonable price and reasonable time), if it would prevent the consumer in an appropriate case from recovering the price paid or the value of any other consideration. (If it would not prevent the consumer from doing so, Part 2 (unfair terms) may apply.)

(4) That also means that a term of a contract to supply services is not binding on the consumer to the extent that it would —

(a) exclude or restrict a right or remedy in respect of a liability under any of sections 49 to 52,
(b) make such a right or remedy or its enforcement subject to a restrictive or onerous condition,
(c) allow a trader to put a person at a disadvantage as a result of pursuing such a right or remedy, or
(d) exclude or restrict rules of evidence or procedure.

(5) The references in subsections (1) to (3) to excluding or restricting a liability also include preventing an obligation or duty arising or limiting its extent.

(6) An agreement in writing to submit present or future differences to arbitration is not to be regarded as excluding or restricting any liability for the purposes of this section.

42.4 **Consumer Rights Act 2015, section 65**

(1) A trader cannot by a term of a consumer contract or by a consumer notice exclude or restrict liability for death or personal injury resulting from negligence.

(2) Where a term of a consumer contract, or a consumer notice, purports to exclude or restrict a trader's liability for negligence, a person is not to be taken to have voluntarily accepted any risk merely because the person agreed to or knew about the term or notice.

TUTORIAL QUESTIONS

THE TERMS OF A CONTRACT

1. ‘It would be a rare contract indeed where both parties expressly agreed not only to all the terms, but also to the consequences of any breach.’

   With reference to decided cases and statutes, critically analyse this statement.

2. Ovid, who does not own a car, decides to rent out his garage to Plato who is looking for somewhere to house his model railway. Ovid tells Plato that the garage will be ready on Monday, but when Plato arrives, he finds that the garage is full of old furniture.

   Ovid promises to have this removed by the next day. When Plato returns it is raining so he decides to drive his car into the garage to unpack his equipment. The garage floor collapses under the weight of the car.

   Discuss Plato’s rights and remedies, if any, against Ovid.

3. Sporty and Posh are sitting in a pub having a drink. Posh mentions that her husband, David, has recently wrecked their Mercedes, and that she had been hoping to use it to drive up to Manchester from London at the weekend. Sporty offers to rent Posh her BMW for £100 to make the journey. At this point, Ginger, who has been listening, joins Posh and Sporty and asks if the BMW has a decent stereo system. Sporty and Posh testily reply: “Get lost Ginger. We don’t want your sort around here!”

   Posh agrees to take the BMW, but when she collects it from Sporty she discovers that it does not have a stereo system at all. She refuses to take the car or pay the hire charge.

   Advise Sporty.

4. **Explain the ways in which contractual terms may be categorised according to their effect, and whether this basis of this categorisation is consistent throughout the cases.**

5. “Implied terms belie the idea that contracts are agreements.”

   Critically analyse this statement.

6. ‘In interpreting contracts, the courts are now more concerned with literalism than with giving effect to reasonable commercial expectation.’

   Critically analyse this statement.

EXEMPTION CLAUSES

7. In order to keep fit during the lockdown, Eli, a keen amateur athlete, decided to buy himself an indoor running machine from Fitness Freaks Ltd., which he had seen advertised in 'Healthy Man', a magazine he had bought from a supermarket. According to the advertisement, the machine could replicate road-running speeds of up to 25 mph. The advertisement contained a notice that 'TERMS APPLY'. There was a website address given on the advertisement, but no indication that this was where the terms were to be found.

Eli phoned Fitness Freaks Ltd. to order the running machine, and spoke to Gill. Eli asked Gill what was meant in the advertisement by 'TERMS APPLY'. Gill said to him: "Nothing unusual. You will get the full written contract with the machine." Eli bought the machine over the phone, using his debit card.

When the machine arrived, Eli was disappointed to see that on the box it said: "Road running speeds of up to 15 mph". He phoned Fitness Freaks Ltd. to ask about this, and got through to Gill again. Gill told him that they had run out of the 25 mph machines, but that the one he had was just as good. She added: "You would have to be Usain Bolt to go at 25 mph!"

Eli was not satisfied, but decided to try the machine out anyway, and assembled it according to the instructions. It seemed to be working properly, until he reached a running speed of 15 mph on it, when it suddenly braked hard, throwing Eli off the machine backwards. He landed on his back and suffered whiplash injuries and severe bruising. He also broke his Fitbit Versa 2 smartwatch in the fall.

In the instruction manual for the machine were listed 20 'Terms of Sale'. These included the following:

i. Fitness Freaks Ltd. accept no liability for any injuries or property damage caused by using this machine. You use our machines at your own risk.

ii. Contents may differ from those ordered. Fitness Freaks Ltd reserve the right to make necessary changes to your order. No refunds are available in such circumstances.

The same terms appear on their website page.

With reference to both the common law and statute, advise Eli as to the likely effect, if any, of Fitness Freaks Ltd's exemption and variation clauses, should Eli sue the company for breach of contract.

8. Zoe frequently visits Sussex Towers, a stately home which is owned and run by Harry Sussex. Although she has often been there before, she is especially attracted to go again by an advertisement that states that there will be a new exhibition of Royal Christening Gowns over the summer of 2019.

On her visit to see the exhibition, Zoe buys an entrance ticket for 50 pence at the gate to the grounds and she puts it into her pocket unread. On the back of the ticket in tiny letters are printed the words: “Entrance to Sussex Towers is subject to the terms on the website. All persons entering the house and grounds do so at their own risk.

On entering the house, she is asked to sign the Visitors’ Book and does so. At the top of each page the same words are printed.

She is disappointed to see that Harry has cancelled the exhibition of Royal Christening Gowns as he has discovered that the insurance on them would be more than he could have got back in entrance fees.

Zoe is then injured and her gold watch is broken by the fall of a chandelier whilst she is in the house.

Amongst the terms on the website are the following clauses:

i. We accept no liability for any loss or injury suffered on the premises beyond the cost of the entrance fee.

ii. We reserve the right to make any necessary changes to the advertised exhibits.

Advise Zoe as to his rights, if any, in the Law of Contract against Harry Sussex.

9. Elsie sees an advertisement in the window of the Alps Double-Glazing Showroom: “Today only. Half-price Double Glazing!” She goes in and agrees with Jack, the proprietor, to have all her windows replaced with Alps Double-Glazing. He asks her to sign a five-page document, but she says she wants to take it away and read it first.

Jack says: “You can do that, but as the shop is about to close by the time you bring it back the special offer will have finished and you will have to pay the full-price.”

Elsie immediately signs the document without reading it and hands it back to Jack.

Jack agrees to do the work that evening. As Elsie thinks she may be out when he arrives, she gives him a set of house keys.

Jack arrives in the late evening to fit the double-glazing, driving a van which is towing a skip. He loses control of the vehicle and crashes through Elsie’s French Windows, destroying some of her antique furniture worth over £50,000. Shortly afterwards Elsie arrives home and crashes her car into the skip in her driveway, wrecking the car and injuring her leg. The skip was not lit and was virtually invisible by night.

The document that Elsie signed contains, inter alia, the following terms:

1. Neither Jack, nor any of his employees, accepts any liability whatsoever for any injury, howsoever caused, during our works to any persons whatsoever.

2. Liability for any property damage caused during our works is strictly limited to £100 in total.

Advise Elsie as to any action she may take in the law of contract.

10. Judy was very excited to see that her favourite singer Kiki was to star in an ice-show about the life of Jane Austen at the Castle Theatre. She called the internet site of the theatre to book a ticket and selected an £80 seat in the front row of the dress-circle for March 1st. Before she could confirm her booking, a screen came up on the computer containing five pages of terms. At the top of the first page was a box containing a notice which read: "By clicking onto this box, you are confirming that you agree to all the standard terms listed below."

Judy read only the first few terms, which concerned rules about not taking photographs or sound recordings in the theatre. She then clicked onto the box, and was taken to a new screen requiring credit card details. She filled this in, clicked the 'submit' button, and completed the order.

When Judy arrived at the theatre on March 1st she left her £1,000 fur coat at the theatre cloakroom, which was run by the independent contractors "Leave It To Us Ltd." The attendant charged her £2 to leave the coat, and gave her a ticket on which was written a number and some words in small print. Judy put the ticket into her handbag without reading it. The ticket read: "Leave It To Us Ltd accept no liability for lost or damaged items above the limit of £50."

When Judy got into the theatre auditorium she found her seat at the front of the dress-circle and leant over to look at the stalls below. In doing so, she put her weight on the safety bar, which gave way, causing her to fall off her seat. She broke her expensive watch and injured her arm.

She then heard an announcement by the stage-manager that due to the indisposition of Kiki, the part of Jane Austen would be played that night by Loser Monroe, the wardrobe mistress of the theatre. In fact, Kiki had phoned the theatre manager to ask if she could have the night off to meet her boyfriend for a pizza. As there were not many tickets sold for that night and Loser Monroe was the theatre manager's daughter, he agreed to her request.

Judy decided not to stay, and went to reclaim her coat at the cloakroom. She discovered that the coat had fallen off its hook into a tray of wet paint and was ruined.

Amongst the terms on the Castle Theatre's internet site were the following clauses:

1. The theatre management and its staff accept no responsibility for any injury or property damage whatsoever which may be caused to any member of the public using the theatre. You enter at your own risk.

2. The theatre management reserve the right to make any alterations necessary to the cast of the show, and no refunds will be given in such a situation.

Advise Judy as to any actions she may have in the law of contract.

11. Basil Fawlty owns a hotel – Fawlty Towers – in Torquay. On March 3rd, he placed the following advertisement in the Torquay Herald:

"Gourmet evening on April 1st at Fawlty Towers. A five-course meal prepared by celebrity chef Gordon Oliver with first class silver-service. Only £50 per person. Usual conditions apply. See website for details."

The advertisement also contained an extensive menu to show what would be on offer.

Major telephoned to book a place at the evening. The telephone was answered by Basil's wife, Sybil. Major asked her what was meant by 'usual conditions'. She replied: "No idea, love. Basil placed the advert. We've never had a Gourmet Evening before. Perhaps you should check the website!"

Major replied that he had no access to the internet, but ordered a place at the event anyway, paying in advance by debit card over the telephone.

When Major arrived for the event, he was handed a menu, at the back of which were written the 'Conditions of the Gourmet Evening." These were the same as those which had appeared on the hotel's website.

Amongst the terms listed were the following:

1. Whilst we will make every effort to ensure that the evening goes as planned, we reserve the right to make any necessary changes. There will be no refunds given in the event of any such variation.

2. Neither the management of Fawlty Towers, nor any of its employees or contractors, accept any liability beyond the sum of £50 for any damage that may occur to visitors' property on the premises, however it is caused.

3. You enter Fawlty Towers entirely at your own risk.

Major went into the dining-room for the meal and was extremely disappointed to be served by Manuel, the hotel's breakfast waiter, who was notoriously clumsy and not silver-service trained. This was because Basil had not sold very many places at the dinner, and had discovered that it was going to be extremely expensive to engage silver-service staff.

Major voiced his complaints to Basil, who ignored him, but he decided to have the meal anyway. He ordered several items from the menu, but was told that everything he wanted was unavailable due to the fact that Gordon Oliver was in a drunken stupor. In fact, there was only one meal available from the menu, and that had been prepared by Polly, the hotel's chambermaid.

Major reluctantly agreed to have this meal. The first course was soup, but in serving it, Manuel tipped it over Major, scalding his hand and ruining his £1,000 dinner suit.

Advise Major, who wishes to sue Basil for breach of contract. (Do not discuss the possibility of frustration of contract.)

12. Ian is a scientist who has been writing a thesis about the inter-reaction of various atomic compounds. He needed a special computer program to record his findings and saw an advertisement in a computer magazine from a company called Softly Software UK Ltd. in which the company offered to design customised software for technical projects.

On April 16th, Ian emailed the company with a description of his requirements and received a reply the same day in the following terms: “Thank you for your enquiry. We are pleased to confirm that we can design a piece of software to match your needs. The cost for this will be £1,000. If you choose to accept this offer, you must do so by May 1st. We will deliver within two weeks of acceptance, subject to our standard conditions.”

Ian did not know what was meant by ‘standard conditions’ but accepted the offer anyway, and on May 7th, the CD containing his special software was delivered.

Ian installed it onto his computer, but found that it in many ways it did not match his specified requirements. Furthermore, when he attempted to download the special graphics program from the CD, it corrupted his hard drive and destroyed a great deal of recorded research which he had not yet had a chance to save externally. It will cost him a great deal of time and money to repeat the research.

On May 9th. Ian took his computer to Datasave plc, a computer repair company. He was given a receipt, which he put into his pocket unread. He returned on May 11th and was told that the hard drive had been virtually destroyed by the corruption. It would cost him £500 for a full repair, but he was told that this would not restore much if any of the data. Ian agreed to have this done, and collected the computer on May 13th.

On his return home he plugged the computer in. Due to a fault in the repair, it overheated and caught fire whilst Ian was using it, setting light to his hair and causing him painful burns.

Softly Software’s website contains a document called ‘Standard Conditions’ which includes the following clauses:

1. Neither the Company nor the Customer shall be liable to the other for any claims for indirect or consequential losses whether arising from negligence or otherwise.

2. In no event shall the Company's liability under the Contract exceed the price paid by the Customer to the Company for the goods and services connected with any claim.

Due to a technical fault, this website had been unobtainable for the whole of April, but Ian had not attempted to gain access to it in any case.

On the back of the receipt he received from Datasave plc were written the words:

> Datasave plc accept no responsibility whatsoever for any injury or financial or property damage caused by any defects in our repairs.

Advise Ian as to any actions he may have in the law of contract.